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SUPREME COURT OF THE UNITED STATES

GEORGE LESTER BALL, ET AL., - Petitioners,

versus

EASTERN COAL CORPORATION, ET AL., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

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GEORGE LESTER BALL, ET AL., - - *Petitioners,*

v.

EASTERN COAL CORPORATION, ET AL., - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

The petitioners pray that a Writ of Certiorari issue to review the decision of the Court of Appeals of Kentucky in this case.

OPINION BELOW.

On March 24, 1967, the Court of Appeals of Kentucky announced the decision sought to be reviewed and its opinion is published in 415 S. W. 2d 620-627. It is appended (Appendix D, p. 48). Petition for rehearing was denied on June 30, 1967.

JURISDICTION.

Petitioners claim jurisdiction to grant certiorari is conferred by 28 USC 2101(c) and by the Labor Management Relations Act, 1947, Section 301(a), codified as 29 USC 185.

QUESTIONS PRESENTED.

The following questions are to be presented by this petition:

1. Where an employer engaged in an industry affecting commerce, as defined in Labor Management Relations Act, 1947, has a contract with a labor organization representing his employees in that industry may the officers or the majority of the members of a local union waive, abrogate and deprive a minority of employee members of their seniority rights under the existing collective bargaining agreement; there being no new agreement and no amended or supplemental agreement to support such privation.

2. Did officers of Labor Union 5737 of the United Mine Workers of America have authority to enter into a local seniority agreement involving job or mine senority, while the parties were under the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952, and as amended thereafter."

3. The further question presented is whether the provision for "Management of Mines," as set out in the collective bargaining agreement above referred to, gave the employer the authority to determine the number of mines that it would operate, and the authority to assign its employees to work in the mines so designated.

4. The final question to be presented is did the Court of Appeals of Kentucky misapply the principles of Aeronautical Lodge v. Campbell, 337 U. S. 512, 93

L. Ed. 1513, 69 S. Ct. 1287 (1948); Ford Motor Company v. Huffman, 345 U. S. 330, 97 L. Ed. 1048, 73 S. Ct. 681 (1952) and Humphrey v. Moore, 94 S. Ct. 363, 375 U. S. 335 (1964), in this case.

STATUTE INVOLVED.

The rights claimed by the petitioners were created by the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952.

The Labor Management Relations Act, 1947, declares the policy of the United States to protect such rights in the portion of the act codified as 29 USC 141(b), which says in part:

> "It is the purpose and policy of this Act in order to promote the full flow of Commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, ..."

STATEMENT OF THE CASE.

Before proceeding with the facts involved it is proper to point out that the original complaint in the Court of first instances relied upon the Labor Management Relations Act, 1947 (Transcript, Kentucky Court of Appeals, p. . . . .). The decision of the Court of first

instances specially undertook to apply the principles of Humphrey v. Moore, 375 U. S. 335, 84 S. Ct. 363), (Appendix "H", p. 56), and Court of last resort in Kentucky, in ruling on the case, held specially that "This action, though brought in a State Court, comes within the ambit of Section 301(a) of the Labor Management Relations Act of 1947, 29 USCA Section 185(a), and is controlled by federal law" (Appendix "H", p. 55).

Eastern Coal Corporation, a corporation created and existing under the laws of the State of West Virginia, and authorized to do business in the Commonwealth of Kentucky owned and operated certain coal mines in Pike County, Kentucky. In 1954, Eastern Coal Corporation operated its mines Nos. 4 and 8 both being located at McAndrews, Kentucky, and its Mine No. 7, located at McVeigh, Kentucky.

Prior to April 1954, each of the plaintiffs was an employee of Eastern Coal Corporation—some being employed at Eastern's Mine No. 4, and some being employed at Eastern's Mine No. 8.

Plaintiffs were members of the United Mine Workers of America, the latter being their exclusive bargaining agent, and Eastern was signatory to the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952, hereinafter referred to as the "Agreement."

The agreement rules all of the parties hereto.

Some of the provisions are so vital in this case that we now quote them and with the indulgence of the court shall later repeat them.

"MANAGEMENT OF MINES.

"The management of the mine, the direction of the working force, and the right to hire and discharge are vested exclusively in the operator, and the United Mine Workers of America shall not abridge these rights." (Emphasis ours.) (See pp. 8, 33 and 60, of Agreement—United Mine Workers of America—District 30—Big Sandy—1941-49 through Sept. 30, 1968, and amendments attached hereto, and made a part hereof.)

This provision was carried forward and made a part of the National Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952, and in all subsequent supplemental agreements and amendments to the Agreement to date.

This Agreement also provided:

"DISTRICT AGREEMENTS.

"This Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference; *and all local agreements, rules, regulations and customs heretofore established in conflict with this agreement are hereby abolished.* Prior practice and customs not in conflict with this agreement may be continued, but any provisions in District or Local Agreements providing for the levying, assessing or collecting of fines or providing for 'no strike,' 'indemnity' or 'guarantee' clauses or provisions are hereby expressly repealed and shall not be applicable during the terms of this agreement.

"Wherever a conflict arises between this Agreement and any Local or District Agreement, this Agreement shall prevail. When day men are

transferred to loading coal the individual affected, if aggrieved, shall have the right of review under settlement of disputes procedures provided for in this Agreement.

"*No District Contract or Agreement negotiated hereinafter shall become effective until approval of such contract by the International Union, United Mine Workers of America, has first been obtained.*" (Emphasis ours.) (See p. 74 of "Agreement United Mine Workers of America—District No. 30—Big Sandy—1941-49—through Sept. 30, 1968 and Amendments.")

This provision was carried forward and made a part of the 1951 Amendment, and of the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952.

This Agreement also provided:

"SETTLEMENT OF LOCAL AND DISTRICT DISPUTES.

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

"1. Between the aggrieved party and the mine management.

"2. Through the management of the mine and Mine Committee.

"3. Through District representatives of the United Mine Workers of America and a commis-

sioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

"5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the Board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement (R. 59-62)." See pp. 74 and 75 of Agreement—United Mine Workers of America—District 30—Big Sandy—1941-49 through Sept. 30, 1968 and amendments.)

This Agreement also provides:

"1. Seniority in principle and practice shall be recognized in the industry.

"2. In all cases where the working force is to be reduced, employees in each job classification at a mine with the least service, shall be laid off first.

"3. Employees who are idle because of a reduction in the working force shall be placed in a

panel from which they shall be returned to employment on the basis of seniority.

"4. Seniority established by the employees previous to the layoff shall be retained and continued upon re-employment from the panel.

"5. The re-employment of any idle person in a new classification is recognized fully providing such person is qualified and is entitled otherwise to the position by reason of his seniority.

"6. The superintendent of the mine and the secretary of the local union shall be joint custodians of the panel record.

"7. *In two or three shift operations the question of seniority with regard to work on the repective shifts shall be left to the discretion of the contracting parties at the mine in question.*

"8. GRIEVANCES under the seniority arrangements shall be handled in the usual way under the machinery of the contract providing for the consideration and disposition of grievances.

"9. Any person in the panel list who secures casual or intermittent employment during the period when no work is available for him at the operation shall in no way jeopardize his seniority rights while engaged in such temporary employment. However, any person on the panel list who secures regular employment at another operation, or outside the industry, and does not return to work when there is available employment at the mine for those in said panel, shall sacrifice his seniority rights at the operation and shall have his name removed from the panel list." (Emphasis ours.) (See pp. 82 and 83 of Agreement—United Mine Workers of America—District 30—Big Sandy—1941-49 through Sept. 30, 1968 and amendments.)

Prior to 1952, neither of the mines involved here were connected by underground haulway or otherwise. Eastern's Mine No. 4 and 8, were and are now located at McAndrews, Kentucky. Eastern's Mine No. 7, was and is now located at McVeigh, Kentucky, approximately two (2) miles distant from McAndrews, Kentucky.

Before 1952, the coal mined at Eastern's Mine No. 4 and its Mine No. 8, was processed in a tipple located at McAndrews, Kentucky. Coal mined at Eastern's Mine No. 7, was processed in a tipple located at McVeigh, Kentucky.

During the year 1952, Eastern Coal Corporation erected a modern cleaning plant at McAndrews, Kentucky. Coal mined at Eastern's Mines Nos. 4 and 8, was processed in the central cleaning plant located at McAndrews, Kentucky.

In the same year Eastern Coal Corporation began driving an underground haulway between its mine No. 7, at McVeigh, Kentucky, and its Mine No. 8, at McAndrews, Kentucky. In constructing the underground haulway, Eastern drove through its old No. 5 Mine located at Pinsonfork, Kentucky, and into its Mine No. 8 located at McAndrews, Kentucky.

The project was completed on or about the 17th day of May, 1953. Upon completion of the underground haulway between the Mine No. 7 and Mine No. 8, Eastern abandoned its tipple at Mine No. 7, at McVeigh, Kentucky, and began transporting coal mined at its Mine No. 7, through the underground haulway and began processing the coal so mined at its Mine

No. 7, in its central cleaning plant located at McAndrews, Kentucky.

These plaintiffs were employed by Eastern Coal Corporation long before May 1953, at its Mines Nos. 4 and 8, and assigned to work in said Mines in various job classifications.

During the month of June 1953, Eastern began transferring some of its employees from its No. 7 Mine at McVeigh, Kentucky, to its Mines Nos. 4 and 8 located at McAndrews, Kentucky.

On or about the 16th day of June 1953, District Seventeen (17) of the United Mine Workers of America caused the charter of Local Union No. 5729, to be surrendered, and the employees transferred from Eastern's Mine No. 7 to its mines Nos. 4 and 8, and the employees remaining in Eastern's Mine No. 7, became members of Local Union No. 5738.

On or about the 31st day of March, 1954, Eastern Coal Corporation began reducing its working forces at its Nos. 4 and 8 Mines.

In reducing its working forces Eastern used *the payroll seniority plan in lieu* of the mine seniority plan as provided for in the contract. (Appendix "A", Report of Pete Phillipi and Joseph Yablonski, bearing date on the 16th day of November 1955.)

The employer, Eastern Coal Corporation, became dissatisfied with the method that it was required to use in furloughing the plaintiffs and filed complaint with the International Union. (See Appendix "B", Report of Tom Raney, International Executive Board Member, dated June 7, 1955.)

These plaintiffs were cut-off or furloughed from employment at Eastern's Mines Nos. 4 and 8, and were replaced by employees of Eastern Coal Corporation that had been transferred from Eastern's Mine No. 7, in June 1953, and thereafter. The employees retained in the places of these plaintiffs had less service in mines Nos. 4 and 8 than the plaintiffs.

These aggrieved plaintiffs acting through and by a committee met with Eastern's Mine Management and Officials and requested that the terms of the contract be honored, and that they be retained in the employment of Eastern because they had more service in Eastern's Mines Nos. 4 and 8, than the employees by whom they were being replaced.

On each visit with the officials and management of the Mines, these plaintiffs were told that it, *Eastern Coal Corporation, had to go along with the Officials of the Local Union.*

Eastern refused to honor its contracts with the plaintiffs and refused to retain them in its employment.

The committee representing the plaintiffs appealed to the "Mine Committee" requesting that a grievance be filed as provided for in the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952, as amended, for settlement of Local and District disputes.

The "Mine Committee" arbitrarily refused to take the matter up with mine management, and refused to file a grievance. The "Mine Committee" informed the plaintiffs that the question of seniority had been

settled with Eastern under a *Local Seniority Agreement,* and that a grievance referable to the District did not exist.

Upon refusal of the "Mine Committee" to present formal grievances, the plaintiffs appealed to District 17, requesting that the "Mine Committee" be required to present formal grievances so that the dispute could be settled and determined in the manner provided for in settlement of Local and District disputes as set out in paragraph eight (8) of the seniority provision of the contract.

District 17, of the United Mine Workers of America sustained the ruling of the "Mine Committee" and held that the dispute was properly settled according to the *alleged Local Seniority Agreement made and entered into between Eastern Coal Corporation and the Local Union.* (See Appendices "A and B".)

The decision of District 17, was appealed to the International Executive Board of the United Mine Workers of America. The International Executive Board appointed commissioners to investigate and make report of its findings concerning the dispute existing at Eastern's mines. On June 7, 1955, and on November 16, 1955, the commissioners made findings and reported to the International Executive Board that there was in existence a *Local Seniority Agreement between Eastern Coal Corporation and the Local Union Officials.* (See Appendices "A and B".)

Further, in his report of June 7, 1955, Mr. Tom Raney, Executive Board Member, in reporting his findings, reported that *representatives of District 17,*

and assisted the Local Union Officers and Eastern Coal Corporation in writing up and agreeing to the Local Seniority Agreement in existence at Eastern Coal Corporation mines. (See Appendix "A".)

The International Executive Board sustained the ruling of District 17, as a result of which the plaintiffs were denied the right to have the dispute settled as provided for in the contract for the settlement of Local and District disputes.

As it had in the past, Eastern Coal Corporation continued mining in Pike County, Kentucky, in its three (3) separate mines.

On June 24, 1954, Eastern certified to the Kentucky Department of Mines and Minerals that it operated Mine No. 4, at McAndrews, Kentucky; that it operated 2 shifts per 24 hours; that it employed 164 men at its Mine No. 4; that its average production was 1500 tons per 24 hours operation; that its foreman was "John O'Brien"; that there was no change in the name and designation of the mine.

On May 11, 1954, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 7, at McVeigh, Kentucky; that it employed 140 men in the mine; that it worked two (2) shifts; that its average production was 1500 tons per 24 hours; that its foreman was "Harold Brodgon"; and that there was no change in name or designation.

On or about April 22, 1954, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it employed 234 men at its Mine

No. 4; that it operated 2 shifts; that its foreman was John O'Brien; and that there was no change in name or designation.

On September 23, 1954, Eastern Coal Corporation certified the Kentucky Department of Mines and Minerals that its Mine No. 7, was located at McVeigh, Kentucky; that it employed 170 men in the mine; that it operated two (2) shifts at the mine; that its average production was 1450 tons per 24 hours; that its foreman was Harold Brodgon; and that there was no change in name or designation.

On June 22, 1955, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 4, at McAndrews, Kentucky; that it employed 290 men in the mine; that it operated three (3) shifts per 24 hours; and that its foreman was Harold Brodgon.

On February 22, 1955, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its mine No. 4, at McAndrews, Kentucky; that it employed 232 men in the mine; that it operated 3 shifts per 24 hours; that its average production was 1800 tons per 24 hours; that its foreman was "John O'Brien"; and that there was no change in name or designation.

On March 14, 1955, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 7, at McVeigh, Kentucky; that it employed 226 men in the mine; that it worked two (2) shifts per 24 hours; that its foreman was John O'Brien; that its average pro-

duction was 1500 tons per 24 hours; and that coal from said mine was processed at the central cleaning plant located at its Mine No. 4.

On September 23, 1955, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 7, at McVeigh, Kentucky; that it employed 274 men in the mine; that it worked three (3) shifts; that it averaged producing 2200 tons per 24 hours; that its foreman was Bill Phillips; and that there was no change in designation or name.

On February 17, 1956, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 4, at McAndrews, Kentucky; that it employed 305 men in the mine; that it worked three (3) shifts per 24 hours; that it averaged producing 2800 tons per 24 hours; and that its foreman was Harold Brodgon.

On March 30, 1956, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 7, at McVeigh, Kentucky; that it employed 227 men in the mine; that it operated three (3) shifts per 24 hours; that it averaged producing 2100 tons per 24 hours; that its foreman was Wm. Phillips; as and to surface equipment. (See No. 4 Mine Inspection Report.)

On August 15, 1956, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 4, at McAndrews, Kentucky; that it employed 270 men at the mine; that it worked three (3) shifts per 24 hours; that it at the

mine; that it worked three (3) shifts per 24 hours; that it averaged producing 2500 tons per 24 hours; and that its foreman was Harold Brodgon.

On August 17, 1956, Eastern Coal Corporation certified to the Kentucky, Department of Mines and Minerals that it operated its Mines No. 7, at McVeigh, Kentucky; that it employed 234 men in the mine; that it worked three (3) shifts per 24 hours; that it averaged producing 2100 tons per 24 hours; and that its foreman was Mr. Phillips.

On January 1, 1957, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 4, at McAndrews, Kentucky; that it employed 270 men at the mine; that it operated three (3) shifts per 24 hours; that its average production was 2600 tons per 24 hours; and that its foreman was Harold Brodgon.

On June 21, 1957, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated Mine No. 7, at McVeigh, Kentucky; that it employed 235 men; that it worked three (3) shifts; that it averaged producing 2300 tons per 24 hours; and that its foreman was Wm. Phillips.

On August 7, 1957, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated Mine No. 4, at McAndrews, Kentucky; that it employed 290 men at the mine; that it operated three (3) shifts per 24 hours; that it averaged producing 2700 tons per 24 hours; and that its foreman was Harold Brodgon.

On November 18, 1957, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 7, at McVeigh, Kentucky; that it employed 300 men at the mine; that it worked two (2) shifts per 24 hours; that it averaged producing 2000 tons per 24 hours, and that the foreman of the mine was Wm. Phillips.

On January 21, 1958, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated Mine No. 4, at McAndrews, Kentucky; that it employed 280 men in mine; that it worked two (2) shifts per 24 hours; that it averaged producing 2700 tons per 24 hours; and that the foreman of the mine was Harold Brodgon.

On January 22, 1958, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 8, McAndrews, Kentucky; that it employed 40 men; that it operated the mine two (2) shifts per 24 hours; that it averaged producing 700 tons per 24 hours; that its foreman was Harold Brodgon; and that its name and designation was unchanged.

On October 7, 1958, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 4, at McAndrews, Kentucky; that it employed 246 men in the mine; that it worked two (2) shifts per 24 hours; that it averaged producing 3100 tons per 24 hours; that its foreman was Harold Brodgon; and that its name was unchanged.

On December 12, 1958, Eastern Coal Corporation certified to the Kentucky Department of Mines and

Minerals that it operated Mine No. 7, at McVeigh, Kentucky; that it employed 116 men in the mine; that it operated two (2) shifts; that it averaged producing 1000 tons per 24 hours; and that its foreman was Wm. Phillips.

On January 27, 1959, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 4, at McAndrews, Kentucky; that it employed 246 men in the mine; that it worked two (2) shifts; that it averaged producing 3200 tons per 24 hours; that its foreman was Harold Brodgon; and that there was no change in name or designation.

On March 24, 1959, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated Mine No. 7, at McVeigh, Kentucky; that it employed 94 men in the mine; that it worked two (2) shifts; that it averaged producing 1100 tons per 24 hours; and that the foreman of the mine was Wm. Phillips.

On March 29, 1959, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated Mine No. 8, at McAndrews, Kentucky; that it employed 84 men; that it worked two (2) shifts; and that it averaged producing 1000 tons per 24 hours; and that its foreman was Harold Brodgon.

On April 17, 1956, Eastern Coal Corporation certified to the Federal Bureau of Mines that it operated Mine No. 7, at McVeigh, Kentucky; that it worked

three (3) shifts; that it averaged producing 2100 tons per 24 hours; and that it employed 265 men in the mine.

On July 11, 1956, Eastern Coal Corporation certified to the Federal Bureau of Mines that it operated Mine No. 4, at McAndrews, Kentucky; that it employed 315 men in the mine; that it averaged producing 2400 tons per 24 hours; and that it worked three (3) shifts.

On December 3, 1956, Eastern certified to the Federal Bureau of Mines that it operated Mine No. 4, at McAndrews, Kentucky; that it worked three (3) shifts; that it employed 315 men in the mine; and that it averaged producing 2700 tons per 24 hours.

On December 10, 1957, Eastern Coal Corporation certified to the Federal Bureau of Mines that it operated Mine No. 4, at McAndrews, Kentucky; that it employed 278 men in the mine; that it worked three shifts; and that it averaged producing 2500 tons per 24 hours.

On December 19, 1957, Eastern Coal Corporation certified to the Federal Bureau of Mines that it operated Mine No. 7, at McVeigh, Kentucky; that it worked three (3) shifts; that it employed 258 men in the mine; and that it averaged producing 2360 tons per 24 hour shift.

(For all of the above see Mine Inspection Reports, Exhibits "D", "E", "F," "G", and "H" in the original record transmitted to this Court.)

Upon rehiring men from the idle panel in February 1962, Eastern continued its practice of assigning men to work in its separate mines Nos. 4 and 7. (See Eastern Coal Corporation's Form No. 21, Exhibit C, C-1 and C-2 in the original record transmitted to this Court.)

The United Mine Workers of America acting through its District President, R. O. Lewis, recognized and acknowledged the existence of Eastern's separate mines through January 1961. (See Appendices "C", "D", and "E".)

ARGUMENT.

PROPOSITION No. 1.

The Officers of Local Union No. 5737, did not have the authority to waive, abrogate or deprive the plaintiffs of seniority rights accrued under the terms of the then existing collective bargaining agreement during the existence of said agreement without the benefit of amended or supplemental agreement.

Authorities.

Herbert Bridges v. F. H. McGraw & Company, (Ky., 1957), 502 S. W. 2d 109.

Hill v. United Public Workers of America (Ky., 1950), 236 S. W. 2d 887.

Piercy v. Louisville & Nashville Ry. Co. (Ky.), 248 S. W. 1042.

N.L.R.B. v. Union Pacific, 99 Fed. 2d 153.

Gatliff Coal Company v. Cox (Ky.), 142 Fed. 2d 876 (6th Cir.).

Discussion.

Collective bargaining agreements are made for the benefit of the individual members as well as to stabilize industry. During the existence of a collective bargaining agreement the individual member has the right to

rely upon its terms in being informed as to what his rights thereunder are. He has the right to the benefits obtained by reason of the agreement until the agreement has been amended, supplemented or changed. If this were not true, the collective bargaining agreement would be meaningless to the worker. The rights of benefits thought to be his could be wiped out by the majority of the union members without notice or justifiable reason.

These plaintiffs do not question the right of the collective bargaining agent to negotiate amended, supplemental or new collective bargaining agreements in which including seniority provisions are changed. Further, they realize that the collective bargaining agent is to represent the whole membership. However, it is their contention that until an amendment or change has been effected that they as individuals have the right to enjoy the benefits obtained under the terms of the existing contract.

In the case before the Court the collective bargaining agreement was in existence and its provisions pertaining to seniority remained unchanged until 1964. There is mention of a local seniority agreement in Appendix "A," but its existence has never confirmed.

In making preparation for the reduction of its working forces at its Mines Nos. 4 and 8, Eastern Coal Corporation knowing that it operated three (3) mines in Pike County, Kentucky, undertook to comply with the terms of the Agreement and furloughed the men that were last transferred to its Nos. 4 and 8 mines.

The "Mine Committee" with the assistance of the officers of District Seventeen (17) insisted that the payroll seniority plan be put in effect. Although Eastern later complied with this request, it filed a complaint with the International Executive Board. (See Appendix "A".)

It has been consistently held in Kentucky that unions and their officers are agents of members for the purpose of securing for its principals (members) fair and just remuneration for their labor and favorable conditions under which to perform it. They are not agents of the members for the purpose of adjusting the individual rights acquired by members in their contracts with employers, nor can the union or its officers change or waive any personal rights of members.

In Hill, *et al.* v. United Public Workers of America, *et al.* (Ky., 1950), 236 S. W. 2d 887, the Court said:

> "These several labor unions which are voluntary unincorporated associations, are entities for limited contractual purposes only. They are clothed with power by their members to make agreements with employers respecting wages, working conditions and related labor questions, and within their legitimate scope such are binding upon the union as an entity and the membership thereof. Saulsberry v. Coopers International Union (Ky.), 143 S. W. 1018. The necessity of stability demands that without it there would be no security or permanency. But the Union may not act in any particular way so as to effect injuriously the personal rights of its members.

A member does not have to submit to the determination of the Union in any question involving his personal rights. Piercy v. Louisville & Nashville R.R. Co. (Ky.), 248 S. W. 1042. As recently expressed in Louisville Ry. Co. v. Louisville Area Transport Workers Union (Ky.), 228 S. W. 2d 652 the Union is the agent and servant of its members, and the membership does not exist for the benefit of the union. Some courts regard a bargaining agreement as one made by the Union for the benefit of third persons, its members, but we are committed to the concept of agency. Aulich v. Craigmyle (Ky.), 59 S. E. 2d 560."

In Herbert Bridges v. F. H. McGraw & Company (Ky., 1957), 302 S. W. 2d 109 the Court said:

"The agreement establishes no concrete contract between the employer and employee, but is only an agreement as to the terms on which contracts of employment may be satisfactorily made and carried out. 31 Am. Jur. Labor Sec. 97. It is contemplated that those terms are to be incorporated in separate contracts of hire with each employee. McKay v. Lowes, Inc., 182 F. 2d 170, 18 ALR 2d 348. When one accepts employment under the collective bargaining agreement, he thereby ratifies and accepts its terms, and his rights and his employers rights are to be measured and adjudged by that contract. McGregor v. Louisville & Nashville Ry. Co. 244 Ky. 696, 51 S. W. 2d 1953. In some relations the Union contracts as a principal but, as we have written a labor union exists for the benefit of its members, and is their servant in securing fair and just wages and

good working conditions though it may not bind the member in the exercise of his personal rights. Piercy v. Louisville & Nashville Ry. Co. (Ky.), 248 S. W. 1042; Hill v. United Public Workers of America (Ky.), 236 S. W. 2d 887."

In Piercy v. Louisville & Nashville Ry. Co. (Ky., 1923), the Court said:

"The primary purpose of the organization of labor unions and kindred organizations is to protect their individual members and to secure for them fair and just remuneration for their labor and favorable conditions under which to perform it. Their agreements with employers looks always to the securing of some right or privilege for their individual members, and the right or privilege so secured by the agreement is the individual right of the individual member and such organization can no more by its arbitrary act deprive that individual member of his right so secured than can any other person. The organization is not the agent of the member for the purpose of waiving any personal right he may have, but is only his representative for the limited purpose of securing for him, together with all other members, fair and just wages and working conditions. Hudson v. C.N.O. & T.P. Ry. Co., 154 S. W. 47.

"If the right of seniority may be changed or waived or otherwise dispensed with by the act of a bare majority of an organization to which the one entitled thereto is a member, it would be builded on a flimsy foundation of sand which might slip from under him at anytime by the arbitrary action of members, possibly to serve their own selfish ends in displacing him."

PROPOSITION No. 2.

The officers of Local Union No. 5737 did not have the authority to enter into a local seniority agreement with Eastern involving mine seniority, and in fact were forbidden to do so under the terms and provisions of the "National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952, effective October 1, 1952, and as amended thereafter."

Authorities.

International Longshoresman's & Warehousemen's Union v. Kuntz, 334 F. 2d 165, 171.

Discussion.

In the National Bituminous Coal Wage Agreement of 1950, effective March 5, 1950, the following provision was inserted:

> "This Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference; and all local agreements, rules, regulations, and customs heretofore established in conflict with this agreement are hereby abolished.
>
> "Wherever a conflict arises between this Agreement and any District or Local Agreement, this Agreement shall prevail."

This provision was carried forward as a part of the Collective Bargaining Agreement of 1950, as amended September 29, 1952, effective October 1, 1952.

The National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, contained the seniority provision giving rise to the dispute in question.

In paragraph two (2) of the seniority section of the contract it was provided that, *"In all cases where the working force is to be reduced, employees in each job classification at a mine with least service shall be laid off first."* (Emphasis ours.)

Further, in paragraph 7, of the seniority section of the contract it states that, *"in two or three-shift operations the question of seniority with regard to work on the respective shifts shall be left to the discretion of the contracting parties at the mine in question."* (Emphasis ours.)

It is clear that the contracting parties intended to, and did eliminate the necessity the exercise of discretion in determining seniority rights. By its terms the parties were required to look at the hiring dates of men in the affected mine and furlough those with least service in that mine. The parties bargained against the exercise of the use of discretion.

Further, it is clear from the terms of the contract that local union authority respecting seniority to shift seniority. It is specifically set out therein in the question of shift seniority could be agreed upon by the local union and the operator. Also, by enumerating this authority to be vested in the local union the contract limited the local union's authority and forbade it to negotiate with respect to mine seniority.

Any local payroll seniority agreement in existence or thereafter created was in conflict with the National Wage Agreement and void. The Local Union was forbidden to act in this area, but did so undertake to act to the detriment of these plaintiffs.

PROPOSITION No. 3.

Under the terms National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952, management retained the right to determine the number of mines, and the location of the mines that it would operate without union interference.

Authorities.

United Steel Workers of America v. Warrior & Gulf Navigation Company (1960), 80 S. Ct. 1347, 363 U. S. 574.

Discussion.

Collective bargaining agreements may regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires, fires, pays, promotes, supervises and plans. All of these are a part of its function, and absent a collective bargaining agreement to the contrary, it may be exercised freely except as limited by public law and by the willingness of employees to work.

The National Coal Wage Agreement of 1950, as amended September 29, 1952, carried forward and preserved the provision in the contract entitled "Man-

agement of Mines." The Agreement provides that *"the management of the mine, the direction of the working force, the right to hire and discharge are vested exclusively in the operator and United Mine Workers of America shall not abridge these rights."* (Emphasis ours.)

Eastern Coal Corporation's reservation of the right to manage included its right to determine how many producing units it would operate in Pike County, Kentucky. In this same contractual provision, the union contracted against its right to interfere with management in area.

Upon negotiating the contract in question it is clear that the United Mine Workers of America and the operator's association recognized the fact that there were in existence employers or an employer such as Eastern that operated two or more mines.

In their consideration of the question of seniority, a decision had to be made between the choice of mine seniority or payroll seniority.

In the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952, the parties to the contract agreed upon the mine seniority provision.

As to those employers operating two or more designated mines, it is clear that the seniority provision, Section 2 contemplated that each of said employers agreed with each employee that he would have and acquire seniority in each designated mine based upon his employment in a particular or designated mine.

The mine referred to was one so designated by the employer. There was no provision in the contract for the designation of mines by the United Mine Workers.

In the case before the Court, Eastern Coal Corporation operated mines in Pike County, Kentucky and designated them as being mines Nos. 4, 7, and 8. In United Steel Workers of America v. Warrior & Gulf Navigation Company, 80 S. Ct. 1347, 363 U. S. 574 (1960), the United States Supreme Court recognized certain rights of management. In that case the Court said:

> "Collective bargaining agreements regulate or restrict the exercise of management function; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All of these are a part of its function."

That Eastern had the right to plan the operation of its mines and distinguish between them as it did is beyond question. Prior to and after the underground connection of Mines Nos. 7 and 8, Eastern Coal Corporation continued to operate and designate them as separate and distinct mines.

Eastern Coal Corporation continued separate mine inspection reports to the Department of Mines of the Commonwealth of Kentucky, and to the Federal Bureau of Mines. Eastern Coal Corporation reported tonnage mined and working conditions in its inspection report as to each of its mines. Eastern employed separate mine foremen for its Mines Nos. 8 and 7, and as late as 1962, the records show that Eastern Coal Cor-

poration upon hiring men assigned them to work in its specific numbered mines. It is inconceivable that all of these records are incorrect with respect to the manner in which Eastern operated its mines in Pike County.

We find nothing in the contract giving the union power to determine how the employer should operate its mines so long as it complies with the provisions contained in the contract. These appellants were compelled to abide by the decision of the employer with respect to the mine to which they were assigned for work. They had the right to seniority based upon the employers assignment to work in one of its designated mines.

It is not the contention of the appellants that Eastern's Mine No. 7 lost its identity at any time, as mentioned by the Appellate Court in its opinion. To the contrary, the documented evidence clearly establishes that Eastern continued the operation of its No. 7 Mine. The inspection reports, designation of mine foreman, and Eastern's "Form 21," all support the position of the appellants that management continued the operations of its Nos. 4, 7 and 8 mines through February, 1962. Further, it is evident that the Union knew of Eastern's continued operation of its separate mines as attested by correspondence of the Union addressed to its local union relating to safety inspection reports.

PROPOSITION No. 4.

The Court of Appeals of Kentucky misapplied the principles of Aeronautical Lodge v. Campbell, Ford Motor Company v. Huffman and Moore v. Humphrey to the facts in this case.

Authorities.

Ford Motor Co. v. Huffman, 345 U. S. 330, 97 L. Ed. 1048, 73 S. Ct. 681 (1952).

Humphrey v. Moore, 375 U. S. 335, 84 S. Ct. 363 (1964).

Aeronautical Lodge v. Campbell, 337 U. S. 521, 93 L. Ed. 1513, 69 S. Ct. 1287 (1948).

Discussion.

In rendering its judgment in this case the Court of Appeals of Kentucky relied heavily upon the decision of the Supreme Court of the United States in Ford Motor Co. v. Huffman, Aeronautical Lodge v. Campbell, and Moore v. Humphrey. In its opinion the Court said:

> "But we need not construe the contract ourselves. Applying the Federal Law as we construe it from the principles stated in the Supreme Court opinions herein cited (referring Ford Motor Co. v. Huffman, Aeronautical Lodge v. Campbell and Moore v. Humphrey), and there being neither fraud no bad faith, as bargaining representative for its members the union had the right and power to resolve this purely intra-union, problem and, in the course of so doing, to effect an agreement with Eastern either interpeting or amending the contract accordingly. If a bargaining representative may alter seniority rights secured by both contract and statute, as in Ford Motor Co. v. Huffman, 345 U. S. 330, 97 L. Ed. 1048, 73 S. Ct. 681 (1952) surely it may do so when the rights are secured by contract only."

The facts in the case before the Court are so different that the above quotation clearly establishes the misapplication of principles. In the cases relied upon there were amended and supplemental collective bargaining agreements made and exhibited to the Courts. Those decisions did not alter rights secured by the selective training and service act. The Court found that the Act intended to preserve such seniority rights as provided for in the agrement.

These appellants have not, do not now contend that collective bargaining agents do not have the authority to amend collective bargaining agreements from time to time as conditions may dictate. However, they do contend that they are entitled to benefits contracted for during the existence of the contract.

In Aeronautical Lodge v. Campbell, 337 U. S. 531, 93 L. Ed. 1513, 69 S. Ct. 1287, the pertinent facts were that Aeronautical Industrial Lodge No. 727, was the duly recognized collective bargaining agent for the employees at Lockheed Aircraft Corporation, 1941, the union or bargaining agent had negotiated an agreement with Lockheed covering the range of subjects touching conditions of employment typical of such agreements in the aircraft industry. This agreement contained seniority provisions. This agreement was in effect when the aggrieved employees entered the employ of Lockheed Aircraft Corporation in August, 1942. Upon entering the employ of Lockheed the aggrieved employees joined the union and remained members throughout the controversy. Two years later the aggrieved employees left the employment of Lockheed

and entered the army. While they were in the service the union *negotiated a new contract* that included a change in the seniority provisions or which modified the 1941 Agreement. Upon discharge from the service the aggrieved employees were restored to their jobs in accordance with the Selective Service Act. In the latter part of 1946, the aggrieved employees were furloughed and they attacked the right of the union to change or modify the seniority provisions of the 1941 Agreement. Also, they asserted their right to protection under the Selective Service Act.

In Ford Motor Co. v. Huffman, 345 U. S. 330, 97 L. Ed. 1048, 73 S. Ct. 681, the pertinent facts are that Huffman, the aggrived employee entered the employ of Ford Motor Company in September, 1943. At the time of his employment, there was in existence a collective bargaining agreement entered into between Ford Motor Company and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, that contained certain seniority provisions based upon length of employment with Ford Motors and with credit for military service. Huffman was inducted into the army in November, 1944, and was discharged July, 1946, and within 30 days was reemployed by Ford Motors with seniority dating from September, 1943, the date of his employment.

On the 30th day of July, 1946, Ford and the International Union executed a supplementary agreement containing the following language in Section 13, thereof:

"(C) Any veteran of World War II who was not employed by any person or company at the time of entry into the service of the land or naval forces or the merchant marine and who is a citizen of the United States and served with the allies and who has been honorably discharged from such training and service and who is hired by the company after he is relieved from training and service in the land or naval forces or after completion of service in the merchant marine, shall upon having been employed for six months and not before, receive seniority service credit for the period of such service subsequent to June 21, 1941."

The effect of this provision was that whereas, Huffman's seniority, and that of members of his class was computed from the respective dates of employment with Ford, and having been credited with their military service, if any, were surpassed in seniority, in many instances, by employees who entered the employ of Ford after they did, but who had entered the service before the date of employment of Huffman by Ford and given credit for the time so spent in service.

Huffman complained of the seniority provision in the supplementary agreement of July 30, 1946, asserting that the same was an unauthorized amendment of the collective bargaining agreement and prohibited by the Selective Service Agreement. In each of the cases the Court sustained the right of the bargaining agent to amend agreements and the seniority provisions therein contained. The Court reiterated its findings that the Selective Service Act did not purport to create seniority rights but, merely to secure unto servicemen such

seniority provisions as were contained in collective bargaining agreements. Further, the Court held that the provision was legitimate and that the union had the authority to accept the provision.

In each of the above cases the aggrieved persons sought to invoke the provisions of the Selective Service Act in their behalf. The Court merely held that the Congress was not creating a system of seniority but recognized its operation as a part of the process of collective bargaining.

It is extremely noticeable that in each of the above cases that there had been an amended or supplementary agreement entered into between the employer company and the union as agent for each of its members. Each of the employees was appraised of the rights secured to him under the provisions of the negotiated contract and upon entering or remaining in the employment of the employer under the contract ratified, accepted and was bound by the terms thereof. To have held that labor contracts cannot be amended or supplemented would have been unreasonable.

In the case before the bar, it is very noticeable that the contract was not amended, nor was there a supplementary agreement entered into. The appellant—employees are not complaining of the right to amend or supplement but, of the authority to waive or disregard the rights secured unto each of them under the terms of a then existing contract in clear and unambiguous language.

The evidence is that the Executive Committee of the United Mine Workers of America appointed a com-

mission composed of William Blizzard, George Titler, and Tom Raney, to investigate a complaint made by Lawrence E. Tierney, President of Eastern Coal Corporation, wherein he complained of the method in which the seniority agreement was being applied. On June 7, 1955, Tom Raney acting for the commission, reported that upon evidence as submitted by the mine committee and local officers that there had been a local seniority agreement between the management of the company and the mine committee and local union, and that district 17 had assisted in writing up and agreeing to the local seniority agreement. (See Exhibit D.) Also the commission appointed on July 7, 1955, in making a report of its findings stated that the president of Local Union No. 5737, stated that there was an understanding on seniority between mine management and officers and committees of both Local Union.

Neither of the reports indicate that there was an authorized amendment to contract affecting seniority, nor has the United Mine Workers offered the alleged writing referred to in the report of June 7, 1955, for the consideration of the Court. Further, by the terms of the contract (Seniority Section 7) the authority of the Local Unions to act on matters of seniority was expressly restricted to matters of work on respective shifts.

In Humphrey v. Moore, *ibid,* the question to be resolved was whether the "Local Joint Committee" and the "Joint Conference Committee" exceed the authority vested in them by the Collective Bargaining

Agreement by dovetailing seniority between the employees of Dealers and the former employees of E. & I. Transport Companies. Article 4, Section 5, of the contract in question in that case provided among other things as follows:

> "In the event that the employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure."

The Court held that the provisions of the contract conferred upon Local Joint Committee and the Joint Conference Committee to exercise discretion in absorption cases, and that the committee did not abuse the authority vested in them. The case before the Court is quite different.

In the National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952, effective October 1, 1952, the parties expressly contracted against the use of discretion in determining the seniority rights of an employee.

In the seniority provision, Section 2, it provided that,

> "In all cases where the working force is to be reduced, employees in each job classification at a mine with least service, shall be laid off first."

In Section 6, of the same provision it is provided that,

"The Superintendent of the mine and the Secretary of the Local Union shall be joint custodians of the panel record."

By language of the agreement the question of determining seniority became ministerial. The only act required was consulting the panel or employment record with a view of ascertaining who had most service in a particular mine. The contract left nothing uncertain or over which to bargain.

Further, in Section 7, of the same provision (seniority) the parties limited the authority of the Local Union in dealing with seniority to shift seniority. It was not vested with the authority to negotiate or determine job seniority and any effort to do so constituted an abuse of its power to the detriment of these plaintiffs without any further showing. The local union undertook to do something that it was forbidden to do.

The union undertook to justify its action in the matter on the basis of necessity because of the provision in the United Mine Worker's Constitution which provides that no mine shall be under the jurisdiction of more than one Local Union. The consideration of the Local Union was purely a matter for union determination. However, we wish to point out that there isn't any prohibition of one or more mines being under the jurisdiction of one Local Union. In fact, it is very prevalent in the mining industry where two or more mines of a common employer in close proximity to each other are under the jurisdiction of a single Local Union. It appears from the record that one Local Union served two (2) or more of Eeastern's mines for a long space

of time. Since Eastern continued the operation of its separate mines there existed no necessity for consolidation. Notwithstanding, the merger or consolidation of local unions did not prevent the union from recognizing the provisions of the contract relating to mine seniority.

CONCLUSION.

Upon the record, and the law as it has often been decided by the Supreme Court of the United States of America, we respectfully submit that this Court should grant the writ prayed for and reverse the cause and render judgment that Eastern violated its contracts with the plaintiffs, and that the United Mine Workers of America wrongfully interfered with the plaintiffs' contracts, and in so doing violated its fiduciary obligation as their agent.

Respectfully submitted,

ABISHI C. CUNNINGHAM,
Merchants & Miners Bank Bldg.,
Welch, West Virginia,

JEAN L. AUXIER,
First National Bank Bldg.,
Pikeville, Kentucky,

Counsel for Petitioners.

Certificate of Service.

It is hereby certified that the foregoing Petition has been served upon the opposing counsel by mailing a copy thereof to John M. Stephens, Esquire, Attorney at Law, Pikeville, Kentucky; to George Richardson, Jr., Esquire, Attorney at Law, Law & Commerce Building, Bluefield, West Virginia; to Albert S. Kemper, Jr., Attorney at Law, Box 370, Bluefield, West Virginia; to J. Erwin Sanders, Esquire, Attorney at Law, Pikeville, Kentucky; to Harrison Combs, Esquire, Attorney at Law, 990 Fifteenth Street Northwest, Washington, D. C.; to H. B. Noble, Esquire, Attorney at Law, Hazard, Kentucky, and to M. E. Boiarsky, Esquire, Attorney at Law, 511 Kanawha Valley Building, Charleston, West Virginia, and to the Honorable James B. Stephenson, trial judge, Pikeville, Kentucky.

This ____ day of September, 1967.

JEAN L. AUXIER,
Attorney for Petitioners.

APPENDIX

APPENDIX "A"

UNITED MINE WORKERS OF AMERICA
Piney Fork, Ohio

November 16, 1955

Mr. John L. Lewis, President
United Mine Workers of America
United Mine Workers' Building
Washington 5, D. C.

Dear Sir and Brother:

Under date of July 7, 1955, you forwarded to the undersigned Commission, the enclosed file of correspondence containing the appeals of Wm. H. Marcum, James H. Marcum, James Hill, Jennings Runyon, Floyd Coley and Luster Offices from a decision of the District 17 Executive Board in a seniority dispute at the Eastern Coal Corporation mines in Stone, Kentucky, Local Union 5737, United Mine Workers of America.

Accordingly, the Commission met in the Sub-District office in Williamson, West Virginia, on Saturday, August 6, 1955, at which time the above appellants were present together with approximately twenty witnesses. The Local Union was represented by K. S. Fowler, President, Jonah Chapman, Vice President, Eddie Justice, Financial Secretary, and Murley Byrge, Treasurer. District 17 was represented by Mr. R. O. Lewis, President, Charles O'Neil, Vice President and Charles Kiser, Field Representative.

The Appellants contend that they were employed at Mine #4 and Mine #8 under the jurisdiction of Local Union 5737. On May 17, 1953, Mine #7, which is under the jurisdiction of Local Union 5729, cut through underground and connected with Mine #8. The Mine #7 tipple was then abandoned and all coal was dumped over the Mine #8 tipple. On June 16, 1953, the District consolidated the two Local

Unions and both mines were put under the jurisdiction of Local Union 5737.

On March 31, 1954 a reduction in the working force was made and approximately 465 men were laid off. The Company used the payroll seniority plan in the layoff, to which the appellants did not object. Subsequently it was mutually agreed that all of the employees of Mine #7, Local Union 5729, who came under the jurisdiction of Local Union 5737 when the mines connected and the Local Unions were consolidated, would be given their original starting dates with the company. The appellants and their witnesses contend that all of the Mine #7 employees who became members of Local Union 5737 by reason of the consolidation should be considered new men and their seniority should begin on May 17, 1953 when the two mines connected. They further contend that under the National Agreement effective October 1, 1952, the District erred when they permitted the company to lay them off, along with other employees of #8 and #4 Mines, by reason that they had more seniority at the mine than those who became members of the Local Union on June 18, 1953, when the two local unions were consolidated. The appellants maintain that unless they get a favorable decision from the International Executive Board that they will resort to the Civil Courts.

Mr. K. S. Fowler, President of Local Union 5737 stated that there was an understanding on seniority between Mine Management and the Officers and Committees of both Local Unions. On June 8, 1953, after the two mines were connected the Company transferred 31 men from Mine #7 to Mine #8. The question was raised by the 31 men as to whether their seniority became effective on June 16, when the two Local Unions were consolidated, which would make them new men in Mine #8, or when the two mines connected on May 17, which would permit them to carry their

mine seniority with them. The District decision of November 2, 1953, which was approved by the Local Union was to the effect that their seniority became effective on May 17, 1953, when the mines connected. The agreement that the #7 and #8 mines became one mine was recognized and agreed by both parties in line with the settlement of disputes clause of the contract. Mr. Fowler further states that the custom and practice at the Eastern Coal Corporation mines was to the effect that if a miner went from one mine to another under the same Local Union, he carried his mine seniority with him, but when a miner transferred from one mine to another under the jurisdiction of a different Local Union, he then withdrew his transfer card and started as a new man. During the past several years miners were transferred from Mine #3 to Mine #8 or to Mine #4 and did not lose their seniority because all three mines were under the jurisdiction of one Local Union even though they were employed in different mines within the meaning of the October 1, 1952 Agreement. On May 17, 1953, the two mines in question were connected underground and Mine #7 tipple was abandoned and all of the coal came out underground to the #8 tipple. Local Union 5729 and Local Union 5737 were merged at the request of the officers and committees of both Local Unions on the basis that it had become one mine. Under date of November 2, 1953, District President Wm. Blizzard, Vice President Charles Payne and Chief Field Representative Charles Kiser executed a document outlining their position on the problem of seniority arising from the consolidation of the mines effective May 17, 1953.

District President R. O. Lewis, stated that the position taken by the District Executive Board on May 15, 1955, was based upon the mutually agreed upon seniority plan in effect at that mine both before and after the consolidation of the two mines.

After reviewing all of the evidence presented in this case the undersigned Commission is of the opinion that the decision of the District 17 Executive Board of May 15, 1955, should be sustained and we so recommend.

Respectfully submitted,

Pete Phillippi, Chairman,
Joseph Yablonski.

Commission

PP/ms

cc: Mr. R. O. Lewis
Local Union 5737
Mr. W. A. Boyle
Mr. Wm. Marcum
Mr. James Hill
Mr. James Marcum
Mr. Jennings Runyon
Mr. Floyd Coley
Mr. Luster Office

APPENDIX "B"

June 7, 1955

Mr. Thomas Kennedy, Vice President
United Mine Workers of America
United Mine Workers' Building
Washington 5, D. C.

Dear Sir and Brother:

In September, 1954, I received a letter from your office directing a Commission composed of William Blizzard, George Titler and me to investigate a complaint made by Lawrence Tierney, Jr., President of the Eastern Coal Corporation, Stone, Kentucky, District No. 17, wherein Mr. Tierney had complained of the method in which the local seniority agreements were being applied referring to pay-

roll seniority, section seniority, department seniority and contract seniority.

The Commission made several different attempts to arrange a meeting with Mr. Lawrence Tierney directly and through Joe Ardigo, Secretary of the Williamson Coal Operators' Association by telephone. Two different meetings were scheduled, however, in each instance something happened to prevent all parties from getting to go.

The Commission did however meet with the Committee of Local Union officers representing the Local Union having jurisdiction over this mine on two different occasions and we found the story or evidence as submitted by the Mine Committee and Local Officers quite different to that which was submitted to your office by Mr. Tierney. We found that there had been local seniority agreements by and between the management of the company and the Mine Committee of the Local Union—also representatives of District 17 had assisted the Local Union officers and the company in writing up and agreeing to the local seniority agreement in existence at the Eastern Coal Corporation.

Under date of May 20, 1955 at the request of President R. O. Lewis, District 17, I attended and set in on a discussion of a seniority controversy from this Local Union in which the District Executive Board—President Lewis, Vice President O'Neil, Secretary Humphreys and Representative Kiser were present and the Board had this question before them and rendered a decision which does, in my opinion, eliminate some of the differences arising out of the application of seniority at this company and if the District Executive Board's recommendations are carried out by the Local Union officers it will, in my opinion, lead eventually to a correction of these abnormalities in the application of seniority.

I advised the District Executive Board of the assignment previously given to the International Commission to

go into this matter and that since the District Executive Board has moved into the picture it was my opinion that your International Commission should withhold making a formal recommendation and to wait and see what develops and if it should be necessary that the Commission later go in on this question, I felt that you would either re-assign the old Commission or appoint a new one to handle this matter.

I am returning the file to your office for future references in the event it should be necessary for the Commission to further investigate this matter.

With best wishes, I am

Very truly yours,

Tom Raney
International Executive Board
Member.

TR:rj

Copy to:

Mr. R. O. Lewis, President, District 17
Box 1313, Charleston, West Virginia
Mr. George J. Titler, President, District 29
Box 511, Beckley, West Virginia
Mr. Charles Kiser, Representative
UMWA office, Williamson, West Virginia.

APPENDIX "C"

UNITED MINE WORKERS OF AMERICA

R. O. Lewis
President

Telephone DI 6-0341
P. O. Box 1313

United Mine Workers Building
1300 Kanawha Boulevard, E.
Charleston 25, W. Va.

August 11, 1959

Mr. K. S. Fowler, Pres.
L. U. 5737, U.M.W. of A.
McAndrews, Ky.

Re: Coal Co. Eastern Coal Corp., Inc.
Mine Stone No. 8
Inspection Date, July 16-17 and 20, 1959.

Dear Sir and Brother:

Attached hereto is a copy of Federal Bureau of Mines report on the inspection of the above listed property.

Please bring this information to the attention of the Safety Committee.

The Mine Safety Committee is hereby requested to take action to have any violations of the Federal Mine Safety Code corrected or otherwise handled in accordance with contractual procedures at the earliest date practical. In the event the District can be of any assistance in this matter, please feel free to call upon them.

Your cooperation and assistance in the efforts of our organization to improve Safety conditions in the mines in which our members are employed will be greatly appreciated.

Yours very truly,

ROL:k
Enclosure
cc: Mr. Elza Johnson

(s) R. O. Lewis, President.

APPENDIX "D"

[UNITED MINE WORKERS LETTERHEAD]

October 13, 1960

Mr. K. S. Fowler, Pres.
L. U. 5737 U. M. W. of A.
McAndrews, Ky.

Re: Coal Co. Eastern Coal Corp., Inc.
Mine Stone No. 4
Inspection Date Aug. 29-31 and Sept. 1, 7 and 8, 1960.

Dear Sir and Brother:

Attached hereto is a copy of Federal Bureau of Mines report on the inspection of the above listed property.

Please bring this information to the attention of the Safety Committee.

The Mine Safety Committee is hereby requested to take action to have any violations of the Federal Mine Safety Code corrected or otherwise handled in accordance with contractual procedures at the earliest date practical. In the event the District can be of any assistance in this matter, please feel free to call upon them.

Your cooperation and assistance in the efforts of our organization to improve Safety conditions in the mines in which our members are employed will be greatly appreciated.

Yours very truly,

(s) R. O. Lewis, President.

ROL:k
Enclosure

APPENDIX "4"

[UNITED MINE WORKERS LETTERHEAD]

January 17, 1961

Mr. K. S. Fowler, Pres.
L. U. 5737, U.M.W. of A.
McAndrews, Ky.

Re: Coal Co. Eastern Coal Corp., Inc.
Mine Stone No. 4
Inspection Date Dec. 19-22, 1960.

Dear Sir and Brother:

Attached hereto is a copy of Federal Bureau of Mines report on the inspection of the above listed property.

Please bring this information to the attention of the Safety Committee.

The Mine Safety Committee is hereby requested to take action to have any violations of the Federal Mine Safety Code corrected or otherwise handled in accordance with contractual procedures at the earliest date practical. In the event the District can be of any assistance in this matter, please feel free to call upon them.

Your cooperation and assistance in the efforts of our organization to improve Safety conditions in the mines in which our members are employed will be greatly appreciated.

Yours Very truly,

(s) R. O. Lewis, President.

ROL:k
Enclosure
cc: Mr. Elza Johnson

APPENDIX "H."

COURT OF APPEALS OF KENTUCKY

RENDERED: MARCH 24, 1967

GEORGE LESTER BALL, ET AL., - - - - *Appellants,*

v.

EASTERN COAL CORPORATION, ET AL., - - *Appellees.*

Appeal from Pike Circuit Court,
Hon. James B. Stephension, Judge.

OPINION OF THE COURT BY JUDGE PALMORE—AFFIRMING.

Appellants, 177 former employes of the appellee Eastern Coal Corporation (hereinafter Eastern), brought this suit for damages against Eastern and the appellee United Mine Workers of America (hereinafter UMW, or the union) claiming they were discharged in violation of their seniority rights under the National Bituminous Coal Wage Agreement of 1950, as amended, to which contract Eastern and UMW, as collective bargaining agent for its members, were parties.[1] After development of the dispositive facts

[1]Pertinent sections of the contract provide as follows:

"SENIORITY

"1. Seniority in principle and practice shall be recognized in the industry.

"2. In all cases where the working force is to be reduced, employees in each job classification at a mine with the least service, shall be laid off first."

(Footnote continued on following page)

(Footnote continued from preceding page)

"8. Grievances under the seniority arrangement shall be handled in the usual way under the machinery of the contract providing for the consideration and disposition of grievances."

. . . . . .

"SETTLEMENT OF DISPUTES

"Should differences arise between the Mine Workers and the Operator as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at any mine, there shall be no supension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately:

"First: Between the aggrieved party and the mine management;

"Second: Through the management of the mine and the Mine Committee;

"Third: By a Board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

"Should the Board fail to agree, the matter shall be referred to an umpire selected by said Board. Should the Board be unable to agree on the selection of an umpire, he shall be designated by the International President of the United Mine Workers of America and the President of the Operators' Association affected. The decision of the umpire in any event shall be final.

"District conferences may establish an intermediate board consisting of two (2) commissioners, one representing the Operators and one representing the Mine Workers with such power as said Conference may delegate.

"Pending the hearing of disputes, the Mine Workers shall not cease work because of any dispute; and a decision reached at any state of the proceedings shall be binding on both parties thereto and shall not be subject to reopening by any party or branch of either association except by mutual agreement."

. . . . . .

"SETTLEMENT OF LOCAL AND DISTRICT DISPUTES

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should

(Footnote continued on following page)

through appropriate pleadings, stipulations and pretrial conference the trial court made findings of facts and conclusions of law and entered a summary judgment denying relief and dismissing the action on the merits.

In 1953 Eastern was operating coal mines in Pike County, including its Nos. 4, 8 and 7. Nos. 4 and 8 were connected by a trestle and operated as a single unit, all of the coal from both openings being processed through a central cleaning plant and tipple at the No. 8 entry. No. 7 was located some two miles away and had its own tipple. Employes at Nos. 4 and 8 belonged to the UMW Local 5737. Those at No. 7 belonged to Local 5729.

On May 17, 1953, Eastern completed an underground haulway connecting Nos. 7 and 8, abandoned its tipple at

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(Footnote continued from preceding page)

any local trouble of any nkid arise at the mine, an earnest effort shall be made to settle such differences immediately.

"1. Between the aggrieved party and the mine management.

"2. Through the management of the mine and the Mine Committee.

"3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

"5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the Board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

No. 7, and began transporting coal from No. 7 through the underground haulway and processing it through the central cleaning plant and tippel at No. 8. Since the UMW constitution provides that no mine shall be under the jurisdiction of more than one of its local unions, on June 16, 1953, District 17 of the union dissolved Local 5729 and transferred its members to Local 5737.

During the next several months Eastern laid off a number of the miners, and disputes arose concerning the manner in which seniority was being or should be determined. The employes who had been working at Nos. 4 and 8 prior to the physical consolidation with No. 7 took the position that the employes at No. 7 became "new men" whose seniority dated from May 17, 1953, in the same manner as employes who had transferred from No. 7 to Nos. 4 and 8 before the consolidation had become "new men" as of their transfer dates. Evidently this was the approach taken initially by Eastern and the Local Mine Committee of the union, but some of the dissatisfied men appealed to higher authority (District 17) within the union, and on November 2, 1953, the president, vice president and chief field representative of District 17 determined in effect that on May 17, 1953, for purposes of seniority Nos. 4, 8 and 7 had merged into a single mine and that all employes retained their respective seniority date as of immediately before that event.[2] This decision was communicated to Local Mine Committee by a letter dated November 2, 1953. The Local Mine Committee then took the matter up with Eastern, whereupon Eastern agreed to and did adjust its payroll accordingly. Thereafter, though Eastern continued its

[2]For convenience, we shall call the system contended for by the Nos. 4 and 8 miners the "mine seniority plan" as opposed to the "payroll seniority plan" decided upon by the union, that being the descriptive terminology used in appellants' brief. However, as hereinafter observed, the dovetailing of seniority lists upon consolidation of two mines into one is not inconsistent with our conception of a "mine seniority plan."

separate numerical designations of the various mine entries for the purpose of work assignments and inspection reports, and the union also continued to recognize such separate identities in its correspondence relating to safety inspections, for purposes of payroll and seniority they were and have been treated as one and the same mine.

Reductions in force at Eastern's operations in Pike County culminated in a substantial number of layoffs in March and April of 1954. Appellants were employes at Nos. 4 and 8 who were discharged pursuant to the payroll seniority plan, but whose names would not have been reached for discharge under their version of the mine seniority plan. In response to their protests Eastern's management advised them that Eastern had to "go along" with the officers of the local union. A committee representing appellants then requested the Local Mine Committee to file a grievance, but the Local Mine Committee took the position that no grievance existed and declined to do so. An appeal to District 17 asking that the Local Mine Committee be compelled to present formal grievances resulted in at decision by the executive board of District 17 on May 27, 1955, holding that the controversy had been properly resolved, and thus affirming the decision theretofore made by its officers and communicated to the Local Mine Committee in the aftermentioned letter of November 2, 1953.

Being dissatisfied with the action of District 17, the aggrieved employes appealed to UMW, whose president appointed a commission composed of two members of the UMW executive board to make a report and recommendation. On November 16, 1955, the commission reported the facts of the controversy to the president and recommended that the opinion of District 17 be sustained.

On May 16 or 17, 1956, a committee representing the aggrieved employes appeared before the executive board of UMW at Washington, D.C., and was afforded a hearing on its appeal from the report and recommendation of the

commission. After such hearing the UMW executive board affirmed the commission's recommendation.

Eastern did not take part in any of the proceedings within the UMW organization.

In this suit the appellants contend that Eastern has breached the contract and UMW has breached its fiduciary duties to them.

More specifically, as we understand it, the position of appellants is that the merger of the two seniority lists in the manner herein described violated their rights under the contract, that the union's determination of its propriety and Eastern's subsequent acquiescence amounted to an unauthorized amendment of the contract, and that the union's participation in this violation of their contract rights and its refusal to submit their complaint to the grievance procedure set forth in the contract constituted a violation of its fiduciary duty of fair representation as their bargaining agent.

Appellants rely heavily on a principle that in our opinion is no longer the law. That principle, stated and applied in *Piercy* v. *Louisville & N. Ry. Co.*, 198 Ky. 477, 248 S. W. 1042, 33 ALR 322 (1932), is that a labor union "is not the agent of the member for the purpose of waiving any personal right he may have, but is only his representative for the limited purpose of securing for him, together with all other members, fair and just wages and good working conditions;" and does not have the authority to adjust or agree to a modification of his seniority rights under a contract between thes union and the employer.

This action, though brought in a state court, comes within the ambit of §301(a) of the Labor Management Relations Act of 1947, 29 USCA §185(a),[3] and is controlled by

[3] §301(a) of the LMRA does not exclude state court jurisdiction of suits for violation of labor contracts governed by federal law. *Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 7 L. Ed. 2d 483, 476, 82 S. Ct. 519 (1962).

federal law.. *Humphrey* v. *Moore*, 375 U. S. 335, 11 L. Ed. 2d 370, 378, 84 S. Ct. 363 (1964).[4]

In *Aeronautic Lodge* v. *Campbell*, 337 U. S. 521, 93 L. Ed. 1513, 69 S. Ct. 1287 (1948), three former employes of Lockheed Aircraft Corporation brought suit against Lockheed challenging the validity, as to them, of an agreement between Lockheed and their union modifying the seniority provisions of a collective bargaining agreement that was in effect when the employes left the company to enter the military service. The right of each employe upon discharge from th eservice to restoration of his employment without loss of seniority was secured by §8 of the Selective Training and Service Act of 1940, as amended. The contract modification agreed upon by the union and the employer during their absence in the military service "provided that 'Union Chairmen who have acquired seniority shall be deemed to have top seniority as long as they remain Chairmen.' In plain Engnish this means that thereafter employees who served as union chairmen were entitled to be retained in case of layoffs regardless of their length of serviec in the plant." 337 U. S. at 523-524. In upholding modification the court said:

> "It is the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static. They are not frozen even by war. . . .

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[4] "*Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 921, of course, has long since settled that §301 has substantive content and that Congress has directed the courts to formulate and apply federal law to suits for violation of collective bargaining contracts." *Smith* v. *Evening News Association*, 371 U. S. 195, 9 L. Ed. 246, 250, 83 S. Ct. 267 (1962). Cf. *Teamsters Union* v. *Lucas Flour Company*, 369 U. S. 95, 7 L. Ed. 2d 593, 598, 82 S. Ct. 571 (1962), holding that "incompatible doctines of local law must give way to principles of federal labor law."

"There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. . . .

"To draw from the Selective Service Act an implication that date of employment is the inflexible basis for determining seniority rights as reflected in layoffs is to ignore a vast body of long-established controlling practices in the process of collective bargaining of which the seniority system to which that Act refers is a part. . . .

"The agreements made by the Union with Lockheed represent familiar developments in the process of collective bargaining which the Selective Service Act presupposes and in the context of which it must be placed. . . .

"Of course, the Selective Service Act restricts a readjustment of seniority rights during the veteran's absence to the disadvantage of the veteran. But it would be an undue restriction of the process of collective bargaining (without compensating gain to the veteran) to forbid changes in collective bargaining arrangements which secure a fixed tenure for union chairmen, whereby veterans as well as nonveterans are benefited by promoting greater protection of their rights and smoother operation of labor-management relations.

"All this presupposes, obviously, but an agreement containing the 1945 provisions expresses honest desires for the protection of the interests of all members of

the union and is not a skillful device of hostility to veterans. There is not the remotest suggestion that the 1945 agreement was other than what it purported to be—the means for securing both to veterans and to nonveterans better working conditions through elected leaders not subject to the contingencies of a labor turnover."

In *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, 97 L. Ed. 1048, 73 S. Ct. 681 (1952), the Supreme Court upheld the authority under the National Labor Relations Act of a labor union to make a collective bargaining agreement with an employer giving its employes credit for pre-employment military service, to the prejudice of employes whose names had been on the seniority roster before they entered military service. Among the principles stated in reaching its conclusion the court said:

"Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

". . . Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the *unit within which seniority is to be computed,* the privileges to which it shall relate, the nature of the work, the time at which

it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in course of service, and time or labor devoted to related public service, whether civil or military, voluntary or involuntary. . . .

"The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet the responsibility." (Emphasis ours.)

We come now to *Humphrey* v. *Moore*, 375 U. S. 335, 11 L. Ed. 2d 370, 84 S. Ct. 363 (1964), the principles of which were held by the trial court to be controlling in this litigation. In that case two competing motor carriers, Dealers Transport Company and E & L Transport Company, divided territories. The employes of both were represented by the same union. As the shift in business in the Louisville area took place E & L began to lay off its employes there, and eventually those who otherwise could not have been absorbed by Dealers submitted to the local union a grievance in which they claimed the right to employment at Dealers through a merger of the respective seniority lists of the two companies. The dispute was carried through the contract-provided grievance procedure with the ultimate result that the E & L men prevailed. Though Dealers was a nominal party in the proceeding it "considered the dispute a matter for the union to decide" and was in substance a disinterested participant. 375 U. S. at 343. Obviously it was the union that made the final decision in the proceeding.

This court, from which the appeal in Humphrey was taken,[5] was of the opinion that the contract rights of the Dealers employes had been violated and that by reason of the antagonistic interests between its members the union was not in a position to give them fair "representation" in

[5] *Moore* v. *Local Union No. 89, etc.*, Ky., 356 S. W. 2d 241 (1962).

a grievance procedure. Our decision was reversed. On the first point, the Supreme Court placed a different construction from that reached by this court on a provision (§5) of the contract relating to seniority in the event of one employer's absorbing the business of another. On the second point, the Supreme Court found that the grievance proceeding was an adequate avenue through which the union could properly exercise its right and authority to resolve an issue between two sets of its members.

Appellants distinguish *Humphrey* v. *Moore,* on the basis of the specific contract provision (§5) in that case. True, in a footnote (375 U. S. at 345, fn. 7) the court expressly said, "We need not consider the problem posed if §5 had been omitted from the contract or if the parties had acted to amend the provision." On the other hand, without that specific contract provision we think *Humphrey* may have presented a more serious question of contract violation, or to put it another way, the right of the union and the employer to amend the contract in the course of continuing collective bargaining, than does this case.

Our first conclusion is that the dovetailing of the seniority lists for Nos. 4 and 8 and No. 7 was neither a violation nor an amendment of the contract. When two mines become one they both lose their separate identities. Appellants would have it that only No. 7 lost its identity. It could be just as well argued the other way around. That the tipple is located at No. 8 does not alter the fact that Nos. 4, 8 and 7, being joined together in one operating unit, are now one mine. That is what the union decided, and if the question were before us on first impression, the union being denied any decision-making authority in the premises, that is what this court also would decide. Hence it was not necessary to amend the contract.

But we need not construe the contract ourselves. Applying the federal law as we construe it from the principle stated in the Supreme Court opinions herein cited, there

being neither fraud nor bad faith, as bargaining representative for its members the union had the right and power to resolve this purely intra-union problem and, in the course of so doing, to effect an agreement with Eastern either interpreting or amending the contract accordingly. If a bargaining representative may alter seniority rights secured both by contract and by statute, as in *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 97 L. Ed. 1048, 73 S. Ct. 681 (1952), surely it must follow that it may do so when the rights are secured by contract only.

Proceeding further, we hold that it was not necessary for the dispute to be resolved through the grievance process. Though such a procedure may be "adequate" to the purpose,[6] if the employer is willing to abide by the union's decision there is no practical reason for proceedings that require its further participation. Whether the ample opportunity actually afforded the appellants in this case to be heard within the structure of the union was legally necessary in order to validate an agreement already made between Eastern and the union may be doubtful, but we are not required to reach the question.

Lastly, we think it is quite clear that the union did not in any sense fail in its duty of fair representation. As the court said in *Humphrey* (375 U. S. at 349, 350), "we are not ready to find a breach of the bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another . . . . Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees reprsented by the

[6]Cf. *Humphrey* v. *Moore*, 375 U. S. 355, 11 L. Ed. 2d 370, 84 S. Ct. 363 (1964), at 375 U. S. 351.

same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes."

The judgment is affirmed.

All concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 664

GEORGE LESTER BALL, ET AL., *Petitioners,*

v.

EASTERN COAL CORPORATION, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

BRIEF OF RESPONDENT EASTERN COAL CORPORATION IN OPPOSITION

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BRIEF OF RESPONDENT EASTERN COAL CORPORATION IN OPPOSITION

OPINIONS BELOW

The Pike Circuit Court, on November 20, 1964, made Findings of Fact, Conclusions of Law and entered an order and judgment in this case, all of which appear in the Appendix to this Brief at pp. 1a-6a. The Court of Appeals of Kentucky unanimously affirmed such

judgment on March 24, 1967, in its opinion published in 415 S.W. 2d 620, and printed in the Appendix to Petitioner's Brief (pp. 50-62).

JURISDICTION

Respondent Eastern Coal Corporation[1] denies jurisdiction to issue a Writ of Certiorari in this case under USCA 2101(c), because Petitioners failed to file their Petition "*within ninety days after the entry of*" the judgment complained of. And, since the filing of the Petition was not timely, Section 301(a) of the Labor Management Relations Act, 1947 (29 USCA 185) should not come into play or have a bearing.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

(a) Was there a timely filing of the Petition in this case and, if not, is late filing jurisdictional?

(b) Even assuming that late filing of the Petition is not jurisdictional, is this a case where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court?

(c) Again assuming that late filing is not jurisdictional, are there *special* or *important* reasons why the Writ should be granted?

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[1] Hereafter called "Eastern". United Mine Workers of America will hereafter be called "UMW". The abbreviation "A" refers to the appendix to this brief; the abbreviation "P.B." refers to Petitioners' Brief; the abbreviation "A.P." refers to the appendix to Petitioners' Brief; and the abbreviation "R" refers to the record in the Court of Appeals of Kentucky. *All emphases are supplied unless otherwise noted.*

COUNTERSTATEMENT OF THE CASE

The Pertinent Facts Are Clear and Simple

Eastern, prior to May 17, 1953, conducted coal mining operations on a boundary of coal land in Pike County, Kentucky. The production of coal from Mine Nos. 3, 4 and 8 fed into and was loaded over the No. 8 Tipple. The area comprising numerically designated Mines 3, 4 and 8, was generally referred to as Mine No. 8, and all the miners working in such area belonged to UMW Local No. 5737. The production from Mine Nos. 7, 7½ and 9 fed into and was loaded over the No. 7 Tipple, and the area comprising numerically designated Mines 7, 7½ and 9 was generally referred to as Mine No. 7, and all the miners working in such area belonged to UMW Local No. 5729 (R. 63).

In September, 1952, a new preparation plant was completed at the No. 8 Tipple and the plan was to bring all coal mined at the Nos. 7 and 7½ Mines through the inside workings of Mine No. 8 and handle it together with the production from Mines 3, 4 and 8 over the No. 8 preparation plant and tipple. This plan—the underground connection between Mine No. 8 and Mine No. 7—was completed on May 17, 1953. The No. 7 tipple was then abandoned and the No. 7 portal was thereafter used only for ready access for men and supplies. At that time, specifically May 17, 1953, there were employed at Mines 7 and 7½ (No. 9 was closed on May 15, 1953) together 482 men and at Mines 3, 4 and 8 together 501 men (R. 64).

Prior to May 17, 1953, Mines 7 and 7½ were connected underground, as were Mines 3 and 8. Mines 4 and 8 were connected by trestle (R. 63). As pointed out above, the miners working in Mine Nos. 3, 4 and

8 belonged to UMW Local No. 5737, and those working in Mine Nos. 7 and 7½ belonged to UMW Local 5729. Throughout the history of Eastern's operation in this boundary of coal land, when mine workers in an area under the jurisdiction of a particular local transferred from one portion of such area to another, the seniority of one so transferring was not affected. On the other hand, and by way of illustration, if a miner working in No. 4 Mine, an area under the jurisdiction of Local No. 5737, transferred to Mine No. 7, the area under the jurisdiction of Local No. 5729, he became a "new man", and his services, insofar as seniority was concerned, commenced *when he transferred* (R. 66).

When, on May 17, 1953, the mine workings between No. 8 Mine and No. 7 Mine were cut together, establishing the first physical connection between those two mines, and resulting in the coal produced in Nos. 7 and 7½ being hauled underground to and loaded over the No. 8 Preparation Plant and Tipple, there was brought into play Section 3, Article XIV of the UMW's Constitution, which provides that "No mine shall be under the jurisdiction of more than one Local Union" (R. 64). By reason of such connection and constitutional provision, the Secretary-Treasurer of UMW District 17 wrote Eastern under date of June 17, 1953, and, in the opening paragraph, stated:

> "Acting under the authority of the instructions from the International Officers of the United Mine Workers of America, you are advised that effective immediately upon receipt of this letter, jurisdiction over your employees who are members of the United Mine Workers of America are transferred from Local Union 5729 to Local Union 5737". (R. 65).

It appears this letter was written the day following the action by the International Officers, for in a letter dated May 27, 1955, from the Executive Board of (UMW) District 17 to the Recording Secretary of Local 5737, it is stated: . . . "On June 16, 1953, Local Union 5729 and Local Union 5737 were consolidated into one local union on the grounds that one mine could not be under the jurisdiction of two local unions."

This action by UMW's International Officers evoked no controversy or complaint at the time it occurred. It so happened, however, that some 33 men transferred from the area comprising Mines 7 and 7½ to the area comprising Mines 3, 4 and 8 *between* May 17, 1953, the date of the completion of the underground connection of Mine 7 with Mine 8, and June 16, 1953, the date UMW consolidated Local 5729 into Local 5737 (R. 66). When a few men were laid off by Eastern on June 26, 1953, Eastern considered with the Local Mine Committee just how the list [2] should be made, and at such time the parties agreed June 16, 1953—the date UMW consolidated the two locals—should be used for purpose of determining the respective seniorities of members of the merged local (No. 5737). But on October 26, 1953, there was another reduction in the working force and again Eastern prepared its list predicated on June 16, 1953, as the controlling date. Some of the affected employees, however, were dissatisfied with the decision and appealed to higher UMW authority, and on such appeal the then President, the then Vice President and the then Chief Field

[2] As here used, means a list of employees to be laid off or idled by a reduction in working force and whose names are placed in a panel from which they shall be returned to employment on the basis of seniority.

Representative of District 17 *held that May 17, 1953,* when the two mines were physically united, *and not June 16th,* was the effective date of the consolidation and the date as of which the seniority of the respective employees should be determined. That decision was communicated to the Local Mine Committee by letter dated November 2, 1953, and that Committee promptly took it up with Eastern as a matter *to be negotiated further under the Agreement.* Eastern agreed with the Local Mine Committee and adjusted its payroll to conform to the UMW position. This was done at November 9, 1953 (R. 66).

Twenty-four of the employees who were laid off on October 26, 1953, and reinstated as of November 9, 1953, engaged an attorney to assert against Eastern claims totaling $2,792.58 for loss of earnings while laid off. The claims were rejected, and thereupon certain of these employees filed charges against Eastern (Case No. 9-CA-783) and against Local Union 5737 (Case No. 9-CB-215) with the National Labor Relations Board at Cincinnati. The charges were referred to Field Examiner Kennedy, who made an investigation into the relevant facts, and on April 16, 1954, Regional Director Evans notified the parties of his refusal to issue a Complaint in these matters. Six days later—April 22, 1954—eight of the employees who had been laid off within the preceding four weeks (all of which are listed among the petitioners in the instant case against Eastern and UMW), filed charges against Local Union 5737 with the NLRB at Cincinnati. Following investigation, the Regional Director declined to issue a complaint (R. 67), and on appeal to the General Counsel and Office of Appeals, the Regional Director was sustained (R. 72).

Certain of the petitioners were laid off or furloughed in a working force reduction made by Eastern on December 1, 1953, and others in the reduction made in March and April, 1954, lists for both of which were prepared in accordance with the November 2, 1953 decision. Their disappointment prompted them to take steps to have the question considered again by UMW's District 17 Board and, as appears from its written report dated May 27, 1955, the Board in substance affirmed the ruling of November 2, 1953.

Thereafter, the aggrieved employees appealed to UMW, whose President named a Commission of the International Union, composed of two members of the UMW Executive Board, which, after hearing appellants and their witnesses, reported to President Lewis under date of November 16, 1955, and recommended that the opinion of District 17 Executive Board of May 15, 1955, be sustained (R. 69).

Some six months later, May 16, 1956, to be exact, a committee representing the aggrieved employees went to Washington, D. C., and presented to the International Executive Board of UMW their appeal from the November 16, 1955, report and recommendation of the Commission. The International Executive Board, after hearing the Committee and others on May 17, 1956, approved and affirmed the recommendation of the Commission (R. 69).

Eastern took no part in any of the proceedings within the UMW.

About five and a half years later—the Fall of 1961—these Petitioners, numbering 177, brought this action in the Pike Circuit Court (Pike County, Kentucky) where, on November 20, 1964, Judge Stephenson ren-

dered judgment in favor of all the Respondents. This judgment, as hereinabove stated, was affirmed by the Court of Appeals of Kentucky, to which Court an appeal was taken.

Petitioners Careless in Their Statement of the Case

At the bottom of page 10 (P.B.) they state:

> "The employer, Eastern Coal Corporation, became dissatisfied with the method that it was required to use in furloughing the plaintiffs and filed complaint with the International Union. (See Appendix "B", Report of Tom Raney, International Executive Board Member, dated June 7, 1955)."

This statement just doesn't jibe with the facts and has no place or pertinency in this case. Counsel for Eastern first learned of the existence of the *Raney Letter* in 1964, when Mr. Cunningham, Counsel for Petitioners, asked whether the complaint mentioned by Mr. Raney was made by letter or in writing, and if so, he would like a copy. After a diligent but unsuccessful search had been made, Counsel for Petitioners was so advised. Shortly thereafter, and at the hearing held by the Trial Judge for the purpose of reaching an agreed statement of facts of this case, Counsel for Petitioners brought up the *Raney Letter* but the Trial Judge omitted any reference to the *Raney Letter* in the "Stipulation of Facts" (R. 59-69), or the "Further Stipulation of Facts" (R. 70-72).

For many and obvious reasons, the *Raney Letter* is not relevant. In the first place, assuming *arguendo* that there was a complaint, it does not purport to pertain to the reductions in working force involved here; in the second place, the *Raney Letter* was an in-

traunion communication written June 7, 1955, some fifteen months after the cut-offs complained of by Petitioners; in the third place, the *Raney Letter* was written eleven months *before* the Committee representing Petitioners appeared in Washington, D. C., to present their appeal from the November 16, 1955, report and recommendation of the Commission. Suffice it to say that had the subject matter of the *Raney Letter* been considered relevant to this controversy, it would have been discussed and reported on by the Commission of the International Union in its report of November 16, 1955, to Mr. John L. Lewis, President of UMW, and made a part of the Stipulation of Facts in this case (R. 68-69).

At the top of page 11 (P.B.) they state:

> "These plaintiffs were cut-off or furloughed from employment at Eastern's Mines Nos. 4 and 8, and were replaced by employees of Eastern Coal Corporation that had been transferred from Eastern's Mine No. 7, in June 1953, and thereafter. The employees retained in the places of these plaintiffs had less service in mines Nos. 4 and 8 than the plaintiffs."

This statement lacks factual foundation. To start with, the only evidence in this record concerning employees who transferred from the area comprising Mines 7 and 7½, to the area comprising Mines 4 and 8, in June, 1953, and thereafter, is found in the Stipulation of Facts and reads: . . . "Some 33 men transferred from Mines 7 and 7½ to Mines 3, 4 and 8 in the interval between May 17, 1953 and June 16, 1953." . . . (R. 66, line 6-8). Apparently they were among those laid off on October 26, 1953, who appealed to higher UMW authority and obtained reinstatement by reason of the decision of November 2, 1953. (R. 66).

As pointed out above, when Mines 7 and 8 were connected on May 17, 1953, there were 501 men working in Mines 3, 4 and 8 and 482 men working in Mines 7 and 7½. (R. 64). Put another way, that gave the surviving Local Union (No. 5737) a total membership of 983. In the report of the International Commission, from which quotations appear in the Stipulation of Facts (R. 68), we find:

> "On March 31, 1954, a reduction in the working force was made and approximately 465 men were laid off. The Company used the payroll seniority plan in the lay-off, *to which the appellants did not object.*" . . .

It seems quite obvious that what Petitioners really mean is that when the two locals were consolidated or merged and the seniority lists of the two were put together or dovetailed, the deep cuts in working force made by Eastern in the period between May 17, 1953 and April 1, 1954, resulted in their names being reached for cut-off simply because they did not have as much payroll seniority as those who were retained. These cut-offs, to be sure, affected all men whose names were on the seniority list, whether they had formerly worked in Mines 4 and 8 or Mines 7 and 7½.

Separate Openings Merely Component Parts of One Extensive Mine Operation

Petitioners devote much of their "Statement of the Case"—actually from near the top of page 13 to a point near the bottom of page 19 (P.B.)—in narrating information from reports to the Kentucky Department of Mines or the Federal Bureau of Mines in the obvious attempt to show multiple mines, though both Eastern and UMW have treated this operation as one mine. This point is belabored by Petitioners notwithstanding

the opinion of the Court of Appeals of Kentucky in this case, which held: "... Thereafter, though Eastern continued its separate numerical designations of the various mine entries for the purpose of work assignments and inspection reports, and the Union also continued to recognize such separate identities in its correspondence relating to safety inspections, *for purposes of payroll and seniority they were and have been treated as one and the same mine.*" (P.B., last sentence beginning bottom page 53).

The Kentucky Cases Cited by Petitioners Are Not Applicable

In support of their Proposition No. 1, Petitioners cite four Kentucky cases (P.B. 20). For the sake of brevity we will refer to them as the *Bridges Case,* the *Gatliff Case,* the *Hill Case* and the *Piercy Case.* These same cases were relied upon by them before the Pike Circuit Court and the Court of Appeals of Kentucky. In *Piercy* (248 S.W. 1042), Petitioners quote at length from the opinion (P.B. 24). Suffice it to say that in relying on these cases, they obviously are grasping at straws. Judge Palmore, in his opinion in this case, discusses at length the *Piercy Case,* and has this cogent observation about it:

> "Appellants rely heavily on a principle that in our opinion is no longer the law. That principle, stated and applied in *Piercy* v. *Louisville & N. Ry. Co.,* 198 Ky. 477, 248 S.W. 1042, 33 ALR 322 (1932), is that a labor union 'is not the agent of the member for the purpose of waiving any personal right he may have, but is only his representative for the limited purpose of securing for him, together with all other members, fair and just wages and good working conditions,' and does not have the authority to adjust or agree to a modification of his seniority rights under a contract between this union and the employer." (P.B. 55).

ARGUMENT

1. Petitioners Failed To File Their Petition and a Transcript of the Record in This Case Within Ninety Days After the Judgment Complained of Became Final

The decision of the Court of Appeals of Kentucky in the instant case was announced on March 24, 1967, and the Petition for rehearing was overruled on June 27, 1967, not June 30, 1967, as stated by Petitioners (P.B. 1). The instant Petition was filed with the Clerk of this Court on September 28, 1967, and not within ninety days after the judgment of the Court of Appeals of Kentucky became final as required by Rule 22(1) of this Court and 28 USCA 2101(c). Since late filing is jurisdictional, it seems clear that this Petition should be dismissed. See: *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 37 L. ed. 719; also *Hope Basket Co.* v. *Product Advancement Corp.*, 342 U.S. 833, 96 L. ed. 630, 72 S. Ct. 44.

In the *Toledo Case* this Court, speaking through Mr. Chief Justice Taft, said:

> "It is insisted by counsel for petitioner that it is within our power and it is our duty on this writ to go into the merits of the issue of the validity of the Smith patent and of the correctness of the money decree for profits. We were asked to do this by an application for writ of certiorari which we denied January 9, 1922 . . . . The decree then sought to be reviewed was entered in October, 1921. The application for this second writ of certiorari was not made until May 22, 1922, more than three months after the final decree in the Circuit Court of Appeals for the payment of profits. Section 6 of the Act of September 6, 1916 . . . directs:
>
> 'That no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entered

unless duly applied for within three months [3] after entry of the judgment or decree complained of.'

This deprives us of jurisdiction to consider the merits of the decree of October, 1921."

And in *Federal Trade Commission* v. *Minneapolis-Honeywell,* 344 U.S. 206, 97 L. ed. 245, 73 S. Ct. 245, in which Mr. Chief Justice Vinson, speaking for a majority of the Court, said:

> "The initial question in this case is one of jurisdiction—whether the petition for certiorari was filed within the period (90 days) allowed by law (28 USCA 2101(c)). We hold that it was not." (97 L. ed. p. 249.)

2. Even Though Such Petition Had Been Filed on Time, This Is Not a Case Where a State Court Has Decided a Federal Question of Substance, Not Theretofore Determined by This Court, or Has Decided It in a Way Probably Not in Accord With Applicable Decisions of This Court

When this suit was instituted in the Pike Circuit Court on December 5, 1961, there was pending before the Court of Appeals of Kentucky the case of *Moore* v. *Local Union 89* (Ky.), 356 N.W. 2d 241. The pronouncements of the opinion in that case, handed down on February 13, 1962, were arguably in disaccord with applicable decisions of this Court. But after this Court reversed the *Moore Case,* in its opinion reported at 375 U.S. 335, 84 S. Ct. 363, both the Trial Court and the Court of Appeals of Kentucky (P.A. 50-62) followed closely the principles enunciated by this Court in that opinion and the cases cited therein. Actually, it is difficult to conceive of a decision of a state court which follows more closely the applicable decisions of this Court.

---

[3] 90 days under present statute (28 USCA 2101(c)).

3. There Are No Special or Important Reasons Here Why the Writ Applied for Should Be Granted

Rule 19 of this Court requires "special and important reasons" for the issuance of a Writ of Certiorari. At no place is there asserted in this Petition that any such reasons exist. The explanation for this omission is obvious—since none exists, none can be asserted.

On the other hand, there is every reason why this Writ should be denied. This is the fourteenth time Petitioners have pressed their claim before a judicial or quasi-judicial body with jurisdiction to decide the case on its merits. The case is now in its 14th year. Surely, in all these years and before all these bodies, if Petitioners had a meritorius case, some Commission or Board or Court would have so found. Of course, the fact is all such bodies recognized that Eastern and UMW had dealt with the Petitioners fairly, equitably and lawfully.

To be sure, reductions in a working force cause disappointments and hardships. But, as pointed out by Judge Palmore of the Court of Appeals of Kentucky, there are two sides to this matter:

> "Our first conclusion is that the dovetailing of the seniority lists for Nos. 4 and 8 and No. 7 was neither a violation nor an amendment of the contract. When two mines become one they both lose their separate identities. *Appellants would have it that only No. 7 lost its identity. It could be just as well argued the othe way around.* That the tipple is located at No. 8 does not alter the fact that Nos. 4, 8 and 7, being joined together in one operating unit, are now one mine. That is what the union decided, and if the question were before us on first impression, the union being denied any decision-making authority in the premises, that is

what this court also would decide. Hence it was not necessary to amend the contract." (P.B. middle p. 60).

CONCLUSION

For reasons set forth under our question (a), this Petition should be dismissed because it was not filed within 90 days after the judgment complained of became final. Moreover, even should this Court decline to dismiss the Petition because of late filing, the issuance of a Writ of Certiorari should be denied as the Petition fails to contain any real reason, special or important, why it should be granted by this Court.

Respectfully submitted,

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October 25, 1967

APPENDIX A

PIKE CIRCUIT COURT

11-20-64

Civil Action No. 5734

GEORGE LESTER BALL, ET AL., *Plaintiffs*

v.

EASTERN COAL CORPORATION, ET AL., *Defendants*

Findings of Fact, Conclusions of Law and Order and Judgment

On the 9th day of October, 1964, came the plaintiffs, by their attorneys, the defendant Eastern Coal Corporation, by its attorneys, the defendant United Mine Workers of America, by its attorneys, and defendants C. E. Beane, Matt Combs and Joe Davis, and each of them, by their attorneys.

Thereupon, plaintiffs, by their attorneys, tendered to the Court for filing their Second Amended Complaint (copies of which counsel for the respective parties plaintiffs and defendants stipulated had been served upon each of the respective defendants immediately prior to this hearing on October 9, 1964) and moved the Court that plaintiffs be permitted further to amend their complaint and amended complaint heretofore filed herein, to which motion each of the defendants severally by their respective counsel objected; and the Court having fully considered the matters alleged in the tendered Second Amended Complaint and having heard and fully considered arguments of counsel as to the proposed amendment and the objections thereto, and being fully advised in the matter and of opinion that the matters set forth in the Second Amended Complaint are neither relevant nor material to the issues in the case as alleged in the complaint and amended complaint and in

the facts as stipulated by the respective parties plaintiffs and defendants, all as set forth in the Stipulation of Facts and Further Stipulation of Facts heretofore agreed upon by the parties hereto after a hearing befor ethe Court, filed herein and made a part of the record in this case, and that therefore plaintiffs should not be permitted further to amend their complaint and amended complaint as set forth in their Second Amended Complaint, it is therefore ORDERED and ADJUDGED by the Court that plaintiffs' motion for leave to amend their complaint and amended complaint as proposed by their Second Amended Complaint be, and the same hereby is, denied, but it is further ordered that said Second Amended Complaint as tendered be filed as a part of the record herein.

Thereupon, the Court considered the written motion of defendant United Mine Workers of America, heretofore filed, to extend its motion to dismiss the complaint to the amended complaint, and there being no objection thereto and the Court perceiving none, the Court does sustain said motion.

Thereupon, this cause came on to be heard on the separate motions of the defendant Eastern Coal Corporation, the defendant United Mine Workers of America and the defendants C. E. Beane, Matt Combs and Joe Davis, and each of them, to dismiss the action, complaint and amended complaint for their failure to state a claim against the respective defendants upon which relief can be granted, and upon the said Stipulation of Facts and the Further Stipulation of Facts, and also upon motion for summary judgment filed by defendant Eastern Coal Corporation and the separate motion of defendant United Mine Workers of America to convert its said motion to dismiss upon the ground therein stated, namely, "Because the complaint fails to state a claim upon which relief can be granted", into a motion (for summary judgment; and upon the motion of defendants C. E. Beane, Matt Combs and Joe Davis,

and each of them, to make said motion of defendant United Mine Workers of America extend to and be made applicable to them, and each of them, which motion the Court is of opinion to, and does hereby, sustain, the parties plaintiff and the other parties defendant being agreeable thereto.

The Court having duly considered the allegations of the complaint as amended and the actual situation disclosed by said Stipulation of Facts and Further Stipulation of Facts, and having heard argument of counsel, and being fully advised in the premises, now makes the following:

Findings of Fact

(1) The controlling facts of the case are as set out in "Stipulation of Facts" and "Further Stipulation of Facts" heretofore agreed upon by the parties hereto after a hearing before the Court, filed herein and made a part of the record herein on May 26, 1964.

(2) Physical connection of Mines 7 and 7½ with Mines 3, 4, and 8 was made on May 17, 1953, and by telegram dated June 16, 1953, the Local Unions affected were advised by officials of District 17, UMW, that the charter of Local No. 5729 had been withdrawn and its membership consolidated with that of Local No. 5737. All men transferred to the consolidated mine prior to May 17th were recognized as "new men" but when certain men were laid off on June 26, 1953, the status of some thirty-three men transferred between May 17, 1953, and June 16, 1953, was in question and was considered by Eastern and the Local Mine Committee, and agreement was reached. Another reduction in the working force occurred October 26, 1953, and some of the affected employees being dissatisfied with the decision reached in June appealed to higher UMW authority. On that appeal the President, Vice President, and Chief Field Representative of District 17 held that the effective date of the consolidation was May 17th when the

two mines were physically united and that the seniority of the Union Members should be determined accordingly. That decision was communicated to the Local Mine Committee by letter dated November 2, 1953, and that Committee promptly took it up with Eastern as a matter to be negotiated further under the Agreement. Eastern agreed with the Local Mine Committee and as of November 9, 1953, adjusted its payroll to conform to the UMW position.

(3) The defendant union, United Mine Workers of America, was and is vested with authority to approve the consolidation of Eastern's mines 7 and 7½ with its mines 3, 4 and 8 into a single producing unit; to withdraw the charter previously issued to Local No. 5729 serving mines 7 and 7½ and give to Local No. 5737, previously serving mines 3, 4 and 8, jurisdiction over the entire consolidated mine; to determine the effective date of such consolidation, and to permit among Union members the "dovetailing" of seniority rights for all members under the jurisdiction of the consolidated local as of such effective date.

(4) The action taken by the Union in resolving such seniority questions as expressed in the decisions of November 2, 1953, made by the then President, the then Vice President and the then Chief Field Representative of District 17 of defendant Union, which decision, under the internal appellate procedure provided by the Union, was affirmed in turn by the District 17 executive board on May 15, 1955; by a commission of the International Union composed of Pete Phillippi, Chairman, and Joseph Yablonsky, both members of the UMW Executive Board, on November 16, 1955, and by the International Executive Board in Washington, D. C. on May 17, 1956, was not an arbitrary or unreasonable exercise of the authority vested in the Union.

(5) Such questions being within the authority and province of the Union to resolve, the defendant, Eastern Coal Corporation, properly abstained from participating in or

interfering with the Union's consideration and resolution of the questions, but Eastern's decision to accommodate itself to the Union's position as stated in the November 2, 1953, letter and not thereafter disaffirmed, was reached in the process of continuing collective bargaining and could not and did not place it in violation of the bargaining agreement.

CONCLUSIONS OF LAW

(1) There was no breach of fiduciary duty by the defendant, United Mine Workers of America, to the plaintiffs.

(2) There was no breach of fiduciary duty by the defendants, C. E. Beane, Matt Combs, and Joe Davis, or either or any of them.

(3) Defendant, Eastern Coal Corporation, did not violate its contract with the Union or any contractual obligation to the plaintiffs herein.

(4) There is no genuine issue as to any material fact; and

(5) By reason of the foregoing, defendant, Eastern Coal Corporation, is entitled to judgment as a matter of law.

(6) By reason of the foregoing, and under principles enunciated in *Humphreys* v. *Moore*, 375 U.S. 355, 11 L. ed. 2d 370 (1964), defendants United Mine Workers of America, C. E. Beane, Matt Combs, and Joe Davis each is entitled to judgment as a matter of law.

JUDGMENT

It is hereby ORDERED that the respective motions of defendant, Eastern Coal Corporation, of defendant, United Mine Workers of America, and of defendants C. E. Beane, Matt Combs, and Joe Davis, and each of them, to dismiss the complaint, the amended complaint and action as to

each of them and their respective motions for summary judgment be, and the same hereby are, granted; and it is

FURTHER ORDERED, that judgment be, and it hereby is, entered herein in favor of defendant Eastern Coal Corporation, of defendant United Mine Workers of America, and of defendants C. E. Beane, Matt Combs and Joe Davis, and each of them, dismissing this action as to each of them, that said plaintiffs take nothing by this action and that each of the said defendants do go thereof without day, and that each of the defendants recover against the said plaintiffs, and each of them, its or his costs; to which rulings and actions of the Court, plaintiffs, and each of them, object and except.

ENTER: JAMES B. STEPHENSON
Judge, Pike Circuit Court,
Division I

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 664

GEORGE LESTER BALL, *et al.*,

Petitioners,

v.

EASTERN COAL CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

BRIEF OF RESPONDENTS UNITED MINE WORKERS OF AMERICA AND OF RESPONDENTS C. E. BEANE, MATT COMBS AND JOE DAVIS IN OPPOSITION

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IN THE

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---

BRIEF OF RESPONDENTS UNITED MINE WORKERS OF AMERICA AND OF RESPONDENTS C. E. BEANE, MATT COMBS AND JOE DAVIS IN OPPOSITION

OPINIONS BELOW

Contrary to Petitioners' statement that "Petition for rehearing was denied on June 30, 1967" (Pet. 1), the certified transcript by the Clerk of the Court of Appeals of Kentucky, now on file in the Clerk's office of this Court, recites that the petition for rehearing was overruled on "6/27/67".

Petitioners[1] accurately note that on March 24, 1967, the Court of Appeals of Kentucky announced its decision and rendered its opinion. The opinion appears in Peti-

[1]The terms "Petitioners" and "plaintiffs" are used interchangeably herein.

tioners' Petition for Writ of Certiorari as Appendix "H.", at pages 50-62.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTES INVOLVED

Though the complaint instituted in the state trial court did not mention any statute, the Court of Appeals' opinion recites (Pet. 55) that "This action, though brought in a state court, comes within the ambit of §301(a) of the Labor Management Relations Act of 1947, 29 USCA §185(a), and is controlled by federal law." Also pertinent is 29 USCA 173(d). The statutes' wording appears in Appendix A to this brief.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Respondents[2] herein do not accept the statement of Questions Presented, as set forth in the Petition (p. 2).

In lieu thereof, Respondents submit the following:

1. Should the certiorari petition be rejected because of late filing?

2. Did the Court of Appeals of Kentucky, under the stipulated facts and applicable law, correctly affirm the trial court's judgment that UMW, as the collective bargaining agent, did not violate its duty of fair representation in resolving a seniority dispute between employees, members of UMW, and in bargaining collectively with the employer thereon, where there was no proof of union hostile discrimination, dishonesty or bad faith?

---

[2]As used herein, the term "Respondents" includes UMW and the three individuals Beane, Combs and Davis. *Although no allegations in the original or amended complaint charge participation by either of the three individuals in any conduct alleged by plaintiffs to be wrongful,* nonetheless the amended complaint asserted that they are necessary and indispensable parties (R. 24).

COUNTERSTATEMENT OF THE CASE

1. THE COMPLAINTS' ALLEGATIONS AND THE LOWER COURTS' JUDGMENTS.

On May 17, 1953, mine workings between Eastern Coal Corporation's[3] No. 8 Mine and No. 7 Mine were physically connected. Employees at each of the mines were members of United Mine Workers of America. Thereafter, when Eastern reduced its work forces, a dispute arose as to the proper date for establishing seniority in the connected mine, resulting in Petitioners' (plaintiffs) loss of employment.

Plaintiffs, who were employees at Eastern's Mines 4 and 8 and UMW members in good standing, instituted the instant action in the Pike Circuit Court (Kentucky) to recover $885,000.00, based upon Eastern's alleged breach of seniority provisions under the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952[4]

The original complaint named Eastern and UMW as defendants (R. 4). An amended complaint (R. 24-30) added as defendants "C. E. Beane, Matt Combs and Joe Davis, Officers and Members of the United Mine Workers of America". Plaintiffs alleged, as to Eastern, that although the 1952 Agreement's seniority provisions provided that "In all cases where the working force is to be reduced, employees in each job classification at a mine with least service, shall be laid off first", on March 31, 1954, Eastern reduced its working forces at the mines and laid off plaintiffs but replaced them in their re-

[3]Eastern Coal Corporation herein is called "Eastern"; United Mine Workers of America herein is called "UMW".

[4]The complaint (R. 7) and amended complaint (R. 30) alleged that "each of these plaintiffs" have been damaged in excess of $5,000.00, and plaintiffs demand judgment of $885,000.00 and costs (R. 7, 30). Pagination references are to the transcript of the record certified by the Clerk of the Court of Appeals of Kentucky and filed in this Court's Clerk's office by Petitioners. *Unless otherwise indicated, all emphases are supplied.*

spective job classifications with employees having less service, thereby breaching its contract.

As to UMW, plaintiffs alleged that UMW owed them a fiduciary obligation to assist them in the protection of their contractual rights but, in violation of such obligation, UMW "wrongfully acquiesced, encouraged and actively encouraged" the contract's violation and "wrongfully conspired" with Eastern in violation of the contract to plaintiffs' injury and prejudice to the end that plaintiffs would be laid off and replaced as aforesaid in Eastern's Mines 4 and 8 (R. 4-7). Additionally, plaintiffs alleged that UMW conspired with local union officers in violation of its fiduciary obligation aforesaid; that plaintiffs requested the "Mine Committee" of Local Union No. 5737 to file charges in accord with the 1952 Agreement; that upon the Committee's arbitrary, capricious and unlawful refusal so to do, an appeal was made to "the Officials of District 17"[5] and to UMW's International Executive Board, both of which ruled arbitrarily and capriciously that "seniority could be transferred under the terms and provisions of an alleged local agreement" (R. 26-29).

The Pike Circuit Court's judgment of October 9, 1965 sustained the respective dismissal motions and motions for summary judgment as to Eastern, UMW and C. E. Beane, Matt Combs and Joe Davis, entered judgment in favor of each of them and dismissed plaintiffs' action (R. 97-98). Upon plaintiffs' appeal to the Court of Appeals of Kentucky, that Court affirmed the trial court's judgment.

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[5]Reference to "District 17" obviously refers to District 17, United Mine Workers of America.

2. THE "STIPULATION OF FACTS" AND "FURTHER STIPULATION OF FACTS".

The trial court directed the parties to submit proposed statements of facts. Though they were "very close to agreement on the contents of an Agreed Statement of Facts" (R. 38), this was not accomplished and the trial court then ordered a hearing at which such proposed statements were discussed at length and considered by the parties in the trial court's presence (R. 58). Thereafter, plaintiffs and defendants agreed to certain facts which were reduced to writing as *stipulated facts* and became a part of the record herein by court order (R. 58).

The "Stipulation of Facts" (R. 59) and "Further Stipulation of Facts" (R. 70), establish that:

Eastern was signatory to the 1952 Agreement negotiated with UMW, which provided *inter alia* as part of the agreement's seniority provisions that "where the working force is to be reduced, employees in each job classification at a mine with the least service, shall be laid off first" (R. 60). Under a heading "Settlement of Local and District Disputes", the agreement also provided a grievance machinery and that "Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement", earnest effort to settle such differences should be made (1) between the aggrieved party and mine management; (2) through management and the Mine Committee; (3) through UMW District Representatives and a company commissioner representative (where employed); (4) by a board consisting of four members, two to be designated by the Mine Workers and two by management; and (5)

arbitration (R. 61-62). Grievances under the seniority arrangements were to be handled under grievance procedures (R. 60-61).

Eastern conducted its mining operations at Stone, Pike County, Kentucky. Eastern, as had its predecessors, gave to its mines, as they were opened, separate numerical designations (R. 63). Like its predecessors, Eastern has opened, closed and changed the numerically designated mines from time to time as circumstances and conditions dictated (R. 63).

Mines Nos. 7, 7½ and 9

Among its mines, Eastern had mines designated as Mines 7, 7½ and 9, and employees at these mines belonged to UMW Local No. 5729 (R. 63-64). Coal produced at these mines was loaded at the No. 7 tipple. Mine 9, opened in 1950, was closed May 15, 1953 (R. 63-64).

Mines Nos. 8, 3 and 4

Production from Eastern's Mine No. 8[6] (which connected underground with Mine No. 3) was loaded, with Mine No. 3's production, at the No. 3 tipple (R. 63). Employees there were members of UMW Local No. 5737. When No. 3 tipple burned in June, 1942, Eastern reactivated the old No. 8 tipple and thereupon production from both Mines 3 and 8 were loaded over the No. 8 tipple (R. 63). Likewise production from Mine No. 4 was loaded over the No. 8 tipple, and employees at Mine No. 4 (like those at Mines 3 and 8) were members of Local No. 5737 (R. 63).

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[6]Mine No. 8 had been closed by Fordson in 1932 and reopened by Eastern in 1938 (R. 63).

Mines 7 and 8 Are Connected; Tipple No. 7 Is Abandoned

In September, 1952, a new preparation plant was completed at the No. 8 tipple (R. 64). The plan was to bring all coal mined at Mines Nos. 7 and 7½ through the inside workings of Mine No. 8 and handle it, together with productions from Mines Nos. 3, 4 and 8, over the No. 8 preparation plant and tipple, thereby eliminating the No. 7 tipple (R. 64).

On May 17, 1953, the mine workings between Mine No. 8 and Mine No. 7 were cut together, establishing the first physical connection between those two mines (R. 64, 95). Thereafter, coal *from what had been No. 7 and* 7½ was hauled underground to and loaded over the No. 8 tipple (R. 64). The No. 7 tipple was abandoned and No. 7 portal was thereafter used only as ready access for men and supplies (R. 64).

At that time, specifically at May 17, 1953, there were 482 men employed at Mines Nos. 7 and 7½ and 501 men at Mines Nos. 3, 4 and 8 (R. 64).

UMW Withdraws One Local's Charter

Officers of both Local No. 5729 and 5737 requested that the two locals be merged on the basis that the two operations had become one mine; and, and in conformity with the settlement of disputes clause in the 1952 Agreement, one mine was recognized and agreed to by both parties. (See Petitioners' brief, pp. 32-33. 34, Appendix E, filed in the Kentucky Court of Appeals).

UMW's Constitution, Article XIV, Section 3, provides that "No mine shall be under the jurisdiction of more than one Local Union" (R. 64). By telegram received at the mine on June 16, 1953, Local Union No. 5729 (to which belonged employees at Mines 7, 7½ and 9) and

Local Union No. 5737 (to which employees at Mines 8, 3 and 4 belonged) were advised by officials of District 17, UMW, that Local No. 5729's charter had been withdrawn and its membership consolidated with that of Local No. 5737 (R. 64). District 17's Secretary-Treasurer advised Eastern that, under instructions from UMW's International officers, jurisdiction over Eastern's employees who are UMW members is "transferred from Local 5729 to Local Union 5737" (R. 65). District 17's Executive Board, by letter, notified Local 5737's Recording Secretary that on May 17, 1953, Mine No. 7 was connected by a haulway with Mine No. 8, resulting in No. 7 tipple being abandoned and all coal from *the consolidated mine* began going out over the No. 8 tipple" and that the two locals *"were consolidated* into one local" because "one mine could not be under the jurisdiction of two local unions" (R. 65).

Transfer of Employees Prior to May 17, 1953

Long before the underground haul was cut, and especially prior to June, 1953, plaintiffs worked in the Nos. 4 and 8 mines (R. 71). *Prior to May 17, 1953,* some employees at Mines Nos. 7, 7½ and 9 transferred to Mines Nos. 8, 3 and 4, and were recognized as "new men", and their seniority rights under the wage agreement were considered to have commenced when they transferred (R. 66).

Transfer of Employees After May 17, 1953; the Lay-off; the Dispute; and the Union's Decision

Between May 17 and June 16, 1953, some 33 men transferred from Mines 7 and 7½ to Mines 3, 4 and 8 (R. 66).

On June 26, 1953, a few men were laid off; and Eastern considered with the Local Mine Committee just how the

list should be prepared (R. 66, 95). Again, on October 26, 1953, another reduction in the working force occurred and again Eastern prepared its list (R. 66, 95). Dissatisfaction of some of the affected employees resulted in an appeal to District 17 (R. 66).

The question raised was whether seniority of the men transferred from No. 7 mine to No. 8 mine became effective on June 16 (date of consolidation of the two locals) so as to constitute them *new* men in No. 8 mine, or whether seniority became effective on May 17 (when the two mines were connected) in which event they carried their mine seniority with them. Plaintiffs contended that (1) all of Mine 7 employees who became members of Local 5737 by reason of the consolidation should be considered new men and their seniority should begin on May 17, 1953, when the two mines connected, and (2) under the 1952 Agreement plaintiffs had "more seniority at the mine" than those who became Local 5737 members when the two locals were consolidated (June 16, 1953) and therefore it was wrong to lay them off (R. 68-69).

District 17's then Vice President and its then Chief Field Representative held that May 17 (when the two mines were united) was the day when seniority should be determined (R. 66, 95). This decision, dated November 2, 1953, resulted in the Local Mine Committee's taking the matter up with Eastern as a matter to be negotiated further under the Agreement, and Eastern agreed with the Local Mine Committee and adjusted its payroll on November 9, 1953, to conform to the District 17 position (R. 66, 95-96).

Twenty-four of those cut off on October 26 and reinstated as of November 9, 1953, engaged an attorney to

assert claims against Eastern for loss of earnings while off (R. 66-67). These were rejected, as were charges filed against Eastern and UMW with the National Labor Relations Board, the Board's regional director refusing to issue a complaint (R. 67), and thereafter, upon appeal the Board's General Counsel and its Appeals Office "sustained the Regional Director's finding that the conduct engaged in was not violative of the" Labor Management Relations Act, 1947 (R. 72).

Other plaintiffs were cut off or furloughed in a working force reduction on December 1, 1953, and in March and April, 1954, respectively, the lists for both being prepared in accordance with the November 2, 1953 decision (R. 67).

Upon employee request, District 17's Executive Board again considered the question and in May, 1955, in substance affirmed the November 2, 1953, ruling (R. 67, 96). Similarly, an appeal to UMW resulted in the appointment of an International Commission, composed of two members of UMW's Executive Board, and the Commission on November 16, 1955, recommended that the November 2, 1953, opinion of District 17's Executive Board, affirmed by it on May 15, 1955, be sustained (R. 67-69, 96).

On May 16, 1956, UMW's International Executive Board in Washington, D. C., heard a committee representing the aggrieved employees on their appeal from the Commission's report and recommendation (R. 69). On May 17, 1956, the International Executive Board approved and affirmed the Commission's recommendation (R. 69, 96).

Eastern took no part in any of the proceedings within UMW (R. 69).

3. THE MOTIONS FOR SUMMARY JUDGMENT; THE TRIAL COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

Respondents moved to convert their respective motions to dismiss upon the ground that the complaint failed to state a claim upon which relief can be granted into a motion for summary judgment (R. 94). Likewise, Eastern moved for summary judgment (R. 94). The court's findings of fact included findings based upon the stipulation of facts and further stipulation of facts (*ante*, pp. 5-10) that UMW had authority to approve the consolidation of Eastern's Mines 7 and 7½ with its Mines 3, 4 and 8 into a single producing unit, to withdraw the charter previously issued to Local No. 5729 and give to Local No. 5737 jurisdiction over the entire consolidated mine, to determine the effective date of such consolidation, and to permit among Union members the "dovetailing" of seniority rights for all members under the jurisdiction of the consolidated local as of the effective date thereof; and that the action taken by UMW in resolving the seniority questions made by District 17's Executive Board, by a commission of UMW, and by UMW's International Executive Board was not an arbitrary or unreasonable exercise of the authority vested in the Union (R. 96). It also found that, the questions being within the Union's authority and province to resolve, Eastern properly abstained from participating in or interfering with the Union's consideration and resolution of the questions, and that Eastern's decision to accommodate itself to the Union's position was reached in the process of continuing collective bargaining and could not, and did not, place Eastern in violation of the bargaining agreement (R. 96-97).

As conclusions of law, the Trial court held (R. 97-98)

there was no breach of fiduciary duty by Respondents; that Eastern did not violate its contract with the Union or any contractual obligation to plaintiffs; that no genuine issue as to any material fact existed; that by reason thereof Eastern is entitled to judgment as a matter of law; and that by reason of the foregoing and under principles enunciated in *Humphrey* v. *Moore*, 375 U.S. 335, Respondents are entitled to judgment as a matter of law. In its judgment, the trial court sustained each of the respective motions for summary judgment (R. 97-98); entered judgment in favor of Eastern, UMW and Beane, Combs and Davis, and dismissed the action as to each of them, noting plaintiff's objections and exceptions (R. 98).

4. THE COURT OF APPEALS' JUDGMENT AND OPINION.

The Court of Appeals on March 24, 1967, affirmed the trial court's judgment. It noted, in its unanimous opinion, that the action, though brought in a state court, fell within the ambit of Section 301(a), Labor Management Relations Act, 1947 [29 USCA 185(a)], and is controlled by federal law, rejecting Petitioners' contention that a principal of state law enunciated in *Piercy* v. *Louisville & N. Ry. Co.*, 198 Ky. 477, 248 S.W. 1042 (1923) governed, and observing the principle "in our opinion is no longer the law" (Pet. 55).

It concluded that "dovetailing of the seniority lists for Nos. 4 and 8 and No. 7 was neither a violation nor an amendment of the contract", declaring that "When two mines become one they both lose their separate identities" (Pet. 60). Agreeing with the Union's decision, the appellate court observed that "if the question were before us on first impression, the union being denied any decision-making authority in the premises, that is

what this court also would decide. Hence it was not necessary to amend the contract" (Pet. 60).

Pointing to this Court's *Humphrey* v. *Moore*, 375 U.S. 335 (1964), *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521 (1948), *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1952), *the Court of Appeals noted there was neither fraud nor bad faith* (Pet. 61). It declared that "as bargaining representative for its members the union had the right and power to resolve this purely intra-union problem and, in the course of so doing, to effect an agreement with Eastern either interpreting or amending the contract accordingly" (Pet. 61). Surely, the appellate court declared, that "If a bargaining representative may alter seniority rights secured both by contract and by statute, as in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 . . . it must follow that it may do so when the rights are secured by contract only" (Pet. 61). Lastly, the Court of Appeals thought it "quite clear that the union did not in any sense fail in its duty of fair representation" (Pet. 61).

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE OF LATE FILING OF THE PETITION.

As shown herein, the record as certified by the Clerk of the Court of Appeals of Kentucky establishes that the petition for rehearing was overruled by that Court on *June 27, 1967*. Under 28 USCA 2101(c) and this Court's Rule 21 (prior to October 2, 1967), a petition for certiorari was required to be filed within ninety (90) days. Thus, such petition must have been filed no later than September 25, 1967. The instant petition was filed September 28, 1967. Since the time limitations are jurisdictional [*Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206; *Rust Land & Lumber*

Co. v. *Jackson*, 250 U.S. 71 (1919)], rejection and dismissal of the petition herein as not timely are appropriate.

II. UNDER THE STIPULATED FACTS AND APPLICABLE LAW, THE COURT OF APPEALS CORRECTLY CONCLUDED THAT UMW, AS THE COLLECTIVE BARGAINING AGENT, DID NOT VIOLATE ITS DUTY OF FAIR REPRESENTATION IN RESOLVING A SENIORITY DISPUTE BETWEEN EMPLOYEES, MEMBERS OF UMW, AND IN BARGAINING COLLECTIVELY WITH THE EMPLOYER THEREON, WHERE THERE WAS NO PROOF OF UNION HOSTILE DISCRIMINATION, DISHONESTY OR BAD FAITH.

1. Union Activity in Resolving the Seniority Dispute And in Bargaining With Eastern Concerning It Constituted Good Faith Bargaining. The Court of Appeals, Affirming the Trial Court, Appropriately Concluded That UMW Did Not Breach Its Fiduciary Obligations Toward Petitioners.

While a labor union's authority as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a duty of fair representation, liability for breach of that duty is imposed only when there is invidious discrimination, dishonesty or bad faith. *Conley* v. *Gibson*, 355 U.S. 41, 42 (1957); *Humphrey*, 375 U.S. 335, 349; *Vaca* v. *Sipes*, 17 L. ed. 2d 842, 859 (1967).

The trial court concluded "There was no breach of fiduciary duty" by Respondents to Petitioners (R. 97) and the Court of Appeals, declaring there was neither fraud nor bad faith, agreed "the union did not in any sense fail in its duty of fair representation" (Pet. 60-61).

The stipulated facts reveal that mine workings between the two mines or groups of mines were joined on May 17, 1953. This was a situation the 1952 Agreement did not specifically cover. But, "the collective bargaining authority is . . . not limited to the negotiations which . . . precede the making of new or successive contracts" but includes "the exceptional as well as the rou-

tine . . . working conditions". *Union News Co.* v. *Hildreth*, 6 Cir., 295 F. 2d 658, 664; *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 346. This Court has recognized that there are "too many unforseeable contingencies" to make the words of a collective bargaining contract the exclusive source of rights and duties; and the bargaining process is a continuous one and includes administering the collective agreement (*United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 579, 581), and the process is designed to be applicable to day-to-day problems (*Ostrofsky* v. *United Steelworkers*, DC, Md., 1959, 171 F. Supp. 782, 793, aff'd. 4 Cir., 273 F. 2d 614).

Consolidation of the two mines or groups of mines into a single mine, as both Kentucky courts found, and Eastern's reduction of working forces posed the problem of seniority among the employees competing for the same jobs. The 1952 Agreement, upon which Petitioners premise their seniority rights, was executed for the benefit of *all of the union's members employed at the two mining operations*, and *not for Petitioners' benefit alone*. When, by reason of changed operational situations, it became apparent the interests of employees at the two operations were involved by the changed circumstances, the union was again confronted with protecting the *collective* interests.

Whatever duty of fair representation UMW owed to Petitioners, it owed the same duty to all others in the competing groups. This Court's requirement that a labor union represent *all* employees without discrimination, announced in *Humphrey*, in *Steele* v. *L. & N. R.R. Co.*, 323 U.S. 192, and in *Ford Motor*, was reiterated in *Vaca* v. *Sipes*, 17 L. ed. 2d 850, where it is said: "... the exclusive

agent's statutory authority . . . includes a statutory obligation to serve the interests of *all* members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."

This is exactly what UMW did. When joinder of the two mines or groups of mines occurred on May 17, 1953, "Local Union 5729 and Local Union 5737 were merged at the request of the officers and committees of both Local Unions on the basis that it had become one mine"[7] and this accorded with UMW's constitutional mandate that "no mine shall be under the jurisdiction of more than one Local Union".[8] *Humphrey's* (375 U.S. 349) reminder that "Conflict between employees represented by the same union is a recurring fact", mirrored precisely the dilemma in which UMW found itself.

To adopt Petitioners' thesis that No. 7 employees should be regarded as *"new men"* would have deprived those employees of their total seniority rights; and of this the union had to be mindful if it was to serve, in honesty and good faith, employees in both Mines No. 7 and No. 8. With joinder of the two mining operations, it would have been equally arguable that No. 8 employees should be regarded as "new men" in the newly combined operation. The Court of Appeals aptly observed, "Appellants would have it that only No. 7 lost its identity. It could be just as well argued the other way around. That the tipple is located at No. 8 does not alter the fact that Nos. 4, 8 and 7, being joined together in one operating unit, are

[7]See Appendix E in Petitioners' Brief filed in the Court of Appeals of Kentucky, pp. 32, 34.

[8]Petitioners would evade this provision by arguing (Pet. 38) there is no prohibition of more than one mine being under a local union's jurisdiction—an assumed premise which is challenged by findings of both the trial and appellate courts.

now one mine" (Pet. 60). The stipulated facts abundantly show a rational basis for selection of May 17, 1953 as the effective date for determining seniority: that was the date when Eastern's two mining operations were connected as one mine. Thereby each employee came to the new and combined operation with such seniority as he had accumulated at his respective mine. It was an equitable solution of conflicting employee claims for seniority rights. It fell within the *"wide range of reasonableness"* accorded UMW as a labor union as bargaining representative. *Ford,* 345 U.S. 338.

Petitioners' Seniority Rights Were not Immutable

Petitioners' complaint (Pet. 35) there was no "authority to waive or disregard the rights secured unto each of them under the terms of a then existing contract" overlooks that, whatever protection against discharge they had, inured to them as a consequence of collective action of their union. It collides with applicable authorities which reject Petitioners' position that seniority rights obtained in collective bargaining are immutable.

In a concurrence in *Humphrey,* Mr. Justice Goldberg, pointing to *Ford,* noted that therein (375 U.S. 354-55)

> "There was no doubt that Huffman and members of his class were injured as a result of the 'supplementary agreement'; they were subjected to layoffs that would not have affected them if the seniority rankings had not been altered",

yet

> "Despite the change in rights under the prior agreement, this Court held that the existing labor agreement did not limit the power of the parties jointly, in the process of bargaining collectively, to make new and different contractual arrangements affecting seniority rights."

Long prior to this Court's *Humphrey* v. *Moore*, the Kentucky Court of Appeals held that if a union had authority to enter into a binding contract which provided seniority rights, it had a right to amend. *Day* v. *L & N R. Co.*, 295 Ky. 679, 175 S.W. 2d 347 (1943). Applying Kentucky Law, a federal district court pointed out that *Day* "denied a plaintiff the right to enforce against his employer seniority rights accruing under a collective bargaining agreement where his duly authorized collective representative negotiated a contract providing for less seniority for the plaintiff, in effect cutting off previous preferences he had enjoyed." *Napier* v. *System Federation No. 91, etc.*, DC, W.D. Ky., 1955, 127 F. Supp. 874, 890. Likewise, *Int. Longshoremen's Union* v. *Kuntz*, 9 Cir., 334 F. 2d 165, 171 (1964), declares that "where the power to bargain is not limited by contract . . . we believe that when 'vested rights' are impaired or extinguished in the course of the bargaining, any recourse by the person affected must then depend upon 'a bad faith motive, an intent to hostilely discriminate' on the part of the bargaining representative . . ." Other federal, as well as state court authority, are in accord.[9] *Hartley* v. *Bro. of Ry. etc. Clerks*, 283 Mich. 201, 206, 277 N.W. 885, recites that the union "had the power by agreement . . . to create the seniority rights of plaintiff(s) and it likewise, by the same method, had the power to modify or destroy these rights in the interest of all the members."

The Court of Appeals Correctly Rejected Petitioners' Citation of Kentucky Cases

Petitioners urge upon this Court (Pet. 20-24, Proposition 1) that under Kentucky law unions and their offi-

[9] *Oddie* v. *Ross Gear & Tool Co.*, 6 Cir., 305 F. 2d 143 (1962); *Wagner Mfg., Inc.* v. *Culbertson*, 206 N.E. 2d 378 (Ind., 1965); *Pratt* v. *Wilson Trucking Co.*, 214 Ga. 385, 104 S.E. 2d 915 (1958).

cers are agents of members to secure for the members as principals fair remuneration for their labor, but that they are not agents "for the purpose of adjusting the individual rights acquired by members in their contracts with employers, nor can the union... change or waive any personal rights of members" (Pet. 22), quoting from *Piercy* v. *Louisville & Nashville Ry. Co.*, 248 S.W. 1042 (Ky., 1923) and kindred cases (Pet. 22-24).

In addition to declaring that under *Humphrey* (375 U.S. 335, 343-44) *federal* law controlled the instant action (Pet. 55-56)[10], the Kentucky Court of Appeals (Pet. 55) declared the *Piercy* principle *"is no longer the law"*,

Petitioners do not challenge the Kentucky appellate court's avowal, and Respondents say properly so since, as noted, *Humphrey* made this proposition clear, and in *Day* (175 S.W. 2d 347) the Kentucky court distinguished *Piercy* and recognized that a labor union "has the right to amend" a labor contract; and in noting the distinction, *Napier* (127 F. Supp. 874, 891) states that *Piercy* "is no authority for denying the employer and the collective bargaining representative the right to modify seniority preferences of employees by undiscriminatory changes in the agreement as previously written."

Similarly, as already shown *(ante,* p. 18), *International Longshoreman's Union* v. *Kuntz*, 9 Cir., 334 F. 2d 165, 171, cited by Petitioners (Pet. 25) in support of their Proposition No. 2 that Eastern and UMW "bargained against the exercise of the use of discretion" does not so hold, but to the contrary, recognizes that "The settlement of a labor dispute, whether accomplished by amendment . . . or by resort to an already existing contract provision, may affect rights which in other fields are re-

[10] *Vaca* v. *Sipes*, 17 L. ed 2d 842, 848, reaffirms this principle.

garded as vested and in a manner would be deemed *'ex post facto'* ".

The Court of Appeals Properly Applied The Principles Enunciated In Humphrey and Kindred Cases.

Appropriately, the Court of Appeals implemented this Court's principle concerning the duty of fair representation as enunciated in *Humphrey, Aeronautical Lodge* and *Ford* and reaffirmed in *Vaca*. Though Petitioners assert that facts in the instant case differ from those in the cases discussed by the Court of Appeals, by reason whereof Petitioners contend that Court misapplied the principles (Pet. 32), the crucial fact remains that *not a single sentence in the entire petition is directed to a challenge of the conclusions of the trial court that Union action "was not an arbitrary or unreasonable exercise of the authority vested in the Union" (R. 96) or of the Court of Appeals' holding that UMW had not acted arbitrarily or in bad faith* (Pet. 61). *Moreover, not a single challenge is to be found in the petition to conclusions of the trial court (R. 97) or the Court of Appeals* (Pet. 61) *that UMW had not breached its duty toward Petitioners on the basis of arbitrariness, invidious discrimination, dishonesty or bad faith on UMW's part.*

Petitioners' complaint included a charge that the "Mine Committee", though requested, arbitrarily refused to present grievances on Petitioners' behalf, which denied them the right to have their dispute adjudicated under the grievance machinery as the 1952 Agreement provided. The Court of Appeals held "it was not necessary for the dispute to be resolved through the grievance process", and "Though such a procedure may be 'adequate' to the purpose, if the employer is willing to abide by the union's decision there is no practical reason for proceedings that require its further participation" (Pet. 61). In

this regard, the "Mine Committee" is not the agent of UMW under the bargaining agreement but, as characterized in *Garmeada Coal Co.* v. *Int. Union of UMWA*, DC, E.D., Ky., 1954, 122 F. Supp. 512, 515, aff'd. 6 Cir., 230 F.2d 945, is "appointed from the membership of the Local *to represent the employees in the settlement of grievances and disputes.*" Moreover, *Vaca* v. *Sipes*,, 17 L.ed 2d 842, rejects Petitioners' thesis by holding (p. 858) that individual employees do not have an absolute right to have grievances processed through the grievance machinery even where the underlying grievances are meritorious (p. 860). Pointing to 29 USCA 173(d), this Court noted that Congress declared "Final adjustment by a method agreed upon by the parties themselves is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." (p. 858).

Respondents submit that the Court of Appeals' approval and affirmance of the judgment in their favor is fully demonstrated by the foregoing discussion.

III. PETITIONERS SEEK THIS COURT'S REVIEW OF EVIDENCE WHICH BOTH THE TRIAL COURT AND THE COURT OF APPEALS OF KENTUCKY HAVE HELD DID NOT SUPPORT THEIR CHARGES AGAINST UMW.

It is evident, in reviewing the certiorari petition, that Petitioners seek this Court's review not only of the evidence but of specific facts. This becomes abundantly clear by Petitioners' emphasis on its references to Eastern's reports to the Kentucky Department of Mines and Minerals during and after April, 1954 (Pet. 13-19, 29) though without regard to other undisputed and vital facts stipulated to by Petitioners which include, as Petitioners concede (Pet. 9), that Eastern connected its No. 7 and No. 8 mines in a project completed in May, 1953.

Though the Court of Appeals, like the trial court, adopted the positions of both Eastern and Respondents herein that Mines Nos. 4 and 8 and No. 7 lost their separate identities and that the dovetailing of the seniority lists neither violated nor amended the collective bargaining agreement (Pet. 60), Petitioners gear their entire certiorari petition on the assumption—and Respondents say an erroneous one—that Eastern "continued mining in Pike County, Kentucky, in its three (3) separate mines" (Pet. 13).

Ignoring all uncontroverted facts reflecting the intra-union dispute between the employees at the joined mines which confronted UMW as the bargaining representative and its good faith determination made in the interests of *all* employee members involved in the conflict over seniority, Petitioners point only to Eastern's reports to the Kentucky Department of Mines and Minerals (Pet. 13-19, 29) and assert that "the documented evidence clearly establishes that Eastern continued the operation of its No. 7 mine" (Pet. 30) as a predicate for this Court's review of findings and conclusions by both Kentucky courts which freed Respondents herein of Petitioners' charge that UMW breached its duty of fair representation. Petitioners' position clearly invites implementation of the rule that the Court does not "grant a certiorari to review evidence and discuss specific facts". *U.S.* v. *Johnson,* 268 U.S. 220, 227.

Of great pertinency, militating against the award of certiorari, is the fact that the evidence Petitioners ask this Court to review does *not* relate to the element of arbitrary or bad faith conduct, which this Court's *Humphrey, Vaca* and kindred cases plainly and firmly avow must be proved as a *sine qua non* to the imposition of liability for breach of the duty of fair representation. And, most tell-

ing that Petitioners are not entitled to review is the significant fact that Petitioners have not challenged UMW's exoneration of arbitrary conduct or bad faith accorded it by both the trial court and the Court of Appeals.

CONCLUSION

In the twelve years since the events occurred, upon which Petitioners base their claims, every tribunal from which Petitioners have sought relief found no merit in Petitioners' contentions that UMW acted improperly. Petitioners waited for more than five years after UMW's Executive Board on May 17, *1956*, rejected their claims before instituting the instant action. As *United Construction Workers* v. *Haislip Baking Co.*, 4 Cir., 223 F.2d 872, 876, recited, "It is a most pertinent circumstance, *as bearing upon the bona fides of plaintiff's claim*, that action was not instituted until more than two years after the occurrences now relied upon as . . . giving rise to the damages claimed."

For the reasons herein discussed, Respondents submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

LABOR MANAGEMENT RELATIONS ACT, 1947:

Section 203(d) [29 USCA 173(d)]

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

Section 301(a) [29 USCA 185(a)]

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.